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REPORTS OF CASES

DECIDED IN THE

At. But.
HIGH COURT OF ADMIRALTY
OF ENGLAND,

AND ON

Appeal to the Privy Council.

1855—1859.

BY M. C. MERTTINS SWABEY, D.C.L.,

ADVOCATE IN DOCTORS' COMMONS, AND OF GRAY'S INN, BARRISTER AT LAW.

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NOTICE.

THIS Number and Index complete a Volume, which brings the Reports down to the period when, by the 22 & 23 Vict. c. 6, the High Court of Admiralty was thrown open to all Branches of the Profession, and its Practice varied by "Rules, Orders and Regulations, &c., with Forms and Tables of Fees," approved and confirmed by Her Majesty in Council on the 29th November, 1859; from that period the Admiralty Reports will be continued by VERNON LUSHINGTON, Esq., of the Inner Temple, Barrister-at-Law.

M. C. MERTTINS SWABEY.

DOCTORS' COMMONS,

July 26, 1860.

Judge of the High Court of Admiralty.

RIGHT HON. STEPHEN LUSHINGTON, D.C.L.

Queen's Advocate.

SIR JOHN HARDING, D.C.L.

Admiralty Advocate.

ROBERT PHILLIMORE, D.C.L.

Admiralty Registrar.

HENRY CADOGAN ROTHERY.

P R E F A C E.

THE last Number published of DR. W. ROBINSON'S Admiralty Reports bears the date of 1850. DR. SPINKS' Ecclesiastical and Admiralty Reports commenced in Easter Term, 1853, but ceased in the summer of 1855. These facts may be thought to justify the present undertaking.

For the greater part of the materials of the present Volume I am indebted to the courtesy of the Editors of the "Law Times" and of the "Shipping and Mercantile Gazette;" who have allowed me to make use of the Cases reported in their respective Journals. I had myself contributed the Reports of Admiralty Cases to the "Law Times" since Michaelmas Term, 1855.

I must also acknowledge the valuable assistance and co-operation of the Registrar of the High Court of Admiralty, without which the present Volume could hardly have assumed the shape it now does.

The next Part will bring the Reports down to the end of 1857; and, if it should be fortunate enough to meet with a satisfactory reception at the hands of the Public, it is intended to continue the series, and to bring out each Number within a reasonable time from the date of the decisions reported therein.

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APPENDIX.

No. I.

ADMIRALTY NOTICE respecting Lights to be carried by Sea-going Vessels to prevent Collision.

By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c. &c.

By virtue of the power and authority vested in us by the Act 14 & 15 Vict. c. 79, dated 7th August, 1851, we hereby require and direct that the following regulations be strictly observed:—

STEAM VESSELS.

All British sea-going steam vessels (whether propelled by paddles or screws) shall, within all seas, gulfs, channels, straits, bays, creeks, roads, roadsteads, harbours, havens, ports and rivers, and under all circumstances, between sunset and sunrise, exhibit lights of such description and in such manner as hereinafter mentioned; viz.:—

When under Steam.

A bright white light at the foremast head.

A green light on the starboard side.

A red light on the port side.

1. The masthead light is to be visible at a distance of at least five miles in a dark night with a clear atmosphere; and the lantern is to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, being ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side.

2. The green light on the starboard side is to be visible at a distance of at least two miles in a dark night with a clear atmosphere; and the lantern is to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, viz., from right ahead to two points abaft the beam on the starboard side.

3. The red light on the port side is likewise to be fitted so as to throw its light the same distance on that side.

4. The side lights are moreover to be fitted with screens on the inboard side of at least three feet long, to prevent the lights from being seen across the bow.

When at Anchor.—A common bright light.

SAILING VESSELS.

We hereby require that all sailing vessels, when under sail, or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision.

All sailing vessels at anchor in roadsteads or fairways shall be also bound to exhibit, between sunset and sunrise, a constant bright light at the masthead, except within harbours or other places where regulations for other lights for ships are legally established.

The lantern to be used when at anchor, both by steam vessels and sailing vessels, is to be so constructed as to show a clear good light all round the horizon.

We hereby revoke all regulations heretofore made by us relating to steam vessels exhibiting or carrying lights, and we require that the preceding regulations be strictly carried into effect on and after the 1st of August, 1852.

Given under our hands the 1st day of May, 1852.

HYDE PARKER,
P. HORNBY.

By command of their Lordships,
W. A. B. HAMILTON.

No. II.

At the Court at Buckingham Palace, the 3rd day of July, 1854.
Present, the Queen's Most Excellent Majesty in Council.

Whereas, by an Act made and passed in the Session of Parliament held in the third and fourth years of her Majesty, chapter 65, intituled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," it is amongst other things enacted, "That it shall be lawful for the Judge of the said High Court of Admiralty, from time to time, to make such Rules, Orders, and Regulations respecting the practice and mode of proceeding of the said Court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit, and from time to time to repeal or alter such Rules, Orders, and Regulations: provided always, that no such Rules, Orders, or Regulations shall be of any force or effect until the same shall have been approved by her Majesty in Council."

And whereas the Right Honourable Stephen Lushington, Doctor of Laws, Judge of the High Court of Admiralty of England, hath duly made and signed certain Rules, Orders, and Regulations respecting the practice and mode of proceeding of the said Court, and the conduct and duties of the officers and practitioners therein, dated "Doctors' Commons, the 22nd of June, 1854," and which said Rules, Orders, and Regulations are in the words following; that is to say,

"I. All bye and default days which have been or may hereafter be appointed for the High Court of Admiralty of England, shall be regular Court days for the return of instruments, the hearing and finally determining causes, and generally for and in respect of all proceedings in the said Court, whether 'in pœnam' or otherwise, as fully and effectually as are the regular sessions of the said Court."

"II. Besides the said sessions, bye days, and default days, it shall be lawful for the Judge of the said Court, as and when he shall think fit, to appoint any other day to be a regular Court day for all the purposes aforesaid, such day to be called an *Additional Court Day*: provided, nevertheless, that a notice in writing of such day having been so appointed shall be suspended in some conspicuous place in the Common Hall of Doctors' Commons, as also in the Registry of the said High Court of

"Admiralty, for at least seven days previous to the date of such additional Court day: provided also, that nothing herein contained shall be taken to prevent the said Judge from appointing, as and when he shall think fit, and without the formal notice aforesaid, any other day, to be called an *Extra Court Day*, for expediting the business in the said Court in causes and proceedings not of an 'in poenam' nature."

Now, therefore, her Majesty in Council, by and with the advice of her said Council, is pleased to approve of the said Rules, Orders, and Regulations.

(Signed) WM. L. BATHURST.

No. III.

ORDER IN COUNCIL confirming certain Rules, Orders and Regulations for the High Court of Admiralty in regard to Instance Proceedings.

(L.S.) At the Court at Windsor, the 7th day of December, 1855.

Present, the Queen's Most Excellent Majesty in Council.

Whereas the Judge of the High Court of Admiralty has, under the provisions of an Act passed in the Session of Parliament held in the third and fourth years of her Majesty's reign, intituled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," made and submitted to her Majesty in Council certain Rules, Orders and Regulations respecting the practice and mode of proceeding in the said Court, and the conduct and duties of the officers and practitioners therein, in regard to Instance Proceedings:

Now, therefore, her Majesty, having taken the said Rules, Orders and Regulations into consideration, is pleased, by and with the advice of her Privy Council, to approve and confirm the same, and the said Rules, Orders and Regulations (copy whereof is hereunto annexed) are hereby approved and confirmed accordingly.

Whereof the Judge, the Registrar and other officers of the said Court, and all others whom it may concern, are to take notice and govern themselves accordingly.

C. C. GREVILLE.

(COPY.)

RULES, ORDERS and REGULATIONS for the High Court of Admiralty in regard to Instance Proceedings.

Whereas by the Act of the 3 & 4 Vict. cap. 65, intituled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," it is amongst other things enacted, "That it shall be lawful for the Judge of the said High Court of Admiralty, from time to time, to make such Rules, Orders and Regulations respecting the practice and mode of proceeding of the said Court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit; and from time to time to repeal or alter such Rules, Orders or Regulations; provided always, that no such Rules, Orders or Regulations shall be of any force or effect until the same shall have been approved by her Majesty in Council."

Now I, Stephen Lushington, Doctor of Laws, Judge of the High Court of Admiralty of England, in virtue of the power and authority given to me by the

said Act, do make the following Rules, Orders and Regulations respecting the practice and mode of proceeding of the said Court, and the conduct and duties of the officers and practitioners therein, in order that the same may be submitted for the approval of her Majesty in Council :—

I. All office copies and other copies of pleadings, proceedings, affidavits, depositions, exhibits and other documents in the High Court of Admiralty shall be counted and charged for at and after the rate of seventy-two words per folio, and every numeral, whether contained in columns, or otherwise written, shall be counted and charged for as a word.

II. In all cases of damage, unless the Judge shall be pleased otherwise to direct, each party, or his proctor, shall, before the libel or act on petition is given in, bring into and deposit in Court a sealed packet, containing a statement of the following particulars :—

1. The names of the two vessels which came into collision, and the names of their respective masters.
2. The time of the collision as nearly as can be stated.
3. The place of the collision.
4. The direction of the wind at the time.
5. The state of the weather.
6. The courses of the respective vessels on first sighting each other.
7. The distance at which the other vessel was first seen.
8. The courses which each vessel thereupon adopted to avoid the collision.
9. The parts of each vessel which first came in contact.

And such packets shall remain in the Registry, sealed up, and shall not be opened, save with the permission of the Judge, until the proofs in the cause are brought in, or the whole of the pleadings and examinations are concluded; and such statements shall be called the "Preliminary Acts."

III. In proceedings by plea and proof in the said Court, no witness shall be examined on any plea, until after the pleadings in the cause have been concluded, except with the permission of the Court, and upon good cause shown.

IV. It shall not be necessary to repeat a witness to his deposition, either in chief or on interrogatories, but the Registrar or Examiner, who shall have taken the evidence, shall certify at the foot of the deposition that the same has been read over audibly and distinctly to the witness, and that the witness has acknowledged the same to be true.

V. If the witness refuse to sign his deposition, the Registrar or Examiner, as the case may be, shall certify at the foot of the deposition that the witness has so refused, and that the deposition is in accordance with the evidence given by such witness; and the deposition of such witness may thereupon be read and referred to at the hearing of the cause.

VI. In proceedings by plea and proof, the proctors, or their substitutes, may, unless the Judge shall order to the contrary, be present at the examination of the witnesses, both in chief and upon interrogatories, but the evidence shall be taken down in writing, as at present, by the Registrar or an Examiner of the Court. The witnesses may be cross-examined upon interrogatories, either prepared beforehand, or framed and put in writing at the time of the examination, and after cross-examination they may in the same manner be re-examined also upon written interrogatories; but the questions shall in all cases be put, and the interrogatories be administered, by the Registrar or Examiner.

VII. No party in a cause, except by special leave of the Judge, shall be allowed to be present at such examination unless he shall be conducting the proceedings in person; and no party, proctor or substitute shall be permitted

APPENDIX.

V

to take any part in such examination, cross-examination, or re-examination, or in any manner to interfere with or object to the conduct or proceedings of the Registrar or Examiner therein, except so far as designing the witnesses to the several articles of the pleas, and tendering written interrogatories to the Registrar or Examiner for the purpose of their being administered to the witnesses.

VIII. It shall be competent to the said Judge to direct the evidence of the witnesses to be taken down by a short-hand writer or reporter appointed by the Court, who shall be previously sworn faithfully to report the evidence, as stated to him by the Registrar or Examiner; and a transcript of the short-hand writer's or reporter's notes, certified by him to be correct, shall be admitted to prove the oral evidence of the witnesses, and be taken and used as evidence in the cause.

IX. The Registrar may, if he shall think fit, in any reference made to him, either alone or with the merchants, allow witnesses to be produced before him for examination, after they shall have been duly sworn to speak the truth according to the mode and practice prevailing in the said Court; and the evidence shall, if either party in the cause shall require it, be taken down by a short-hand writer or reporter appointed by the Court, who shall be previously sworn faithfully to report the evidence as stated to him by the Registrar; and a transcript of the short-hand writer's or reporter's notes, certified by him to be correct, shall be admitted to prove the oral evidence of the witnesses, and be taken and used as evidence in an objection to the Registrar's report on such reference.

X. The pleadings and proofs shall in all contested suits, unless the Judge shall order to the contrary, be printed prior to the hearing thereof; and such printing shall be in such manner and form, and under such regulations in regard to the cost and mode of printing the same, as the Judge of the said Court may from time to time direct.

XI. These Rules, Orders and Regulations shall, if previously approved by her Majesty in Council, come into operation on the first day of January, 1856.

Witness my hand this first day of December, 1855.

STEPHEN LUSHINGTON.

No. IV.

ADMIRALTY NOTICE respecting LIGHTS and Fog SIGNALS to be carried and used by Sea-going Vessels, to prevent Collision.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

By virtue of the power and authority vested in us we hereby revoke, as from and after the thirtieth day of September, 1858, the regulations made and published by us on the first day of May, 1852, relating to the Lights to be carried by Sea-going Vessels to prevent collision: And we hereby make the following regulations, and require and direct that the same be strictly observed and carried into effect on and after the first day of October, 1858.

STEAM VESSELS.

All Sea-going Steam Vessels, when under Steam, shall, between sunset and sunrise, exhibit the following Lights:

1. A bright White Light at the Foremast Head.
A Green Light on the Starboard side.
A Red Light on the Port side.

2. The Mast-head Light shall be so constructed as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles, and shall show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, and it shall be so fixed as to throw the light ten points on each side of the ship, viz.: from right ahead to two points abaft the beam on either side.

3. The Green Light on the Starboard side and the Red Light on the Port side shall be so constructed as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and show an uniform and unbroken light over an arc of the horizon of ten points of the compass, and they shall be so fixed as to throw the light from right ahead to two points abaft the beam on the Starboard and on the Port sides respectively.

4. The side Lights are to be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent the Lights from being seen across the bow.

5. Steam Vessels under Sail only are not to carry their mast-head Light.

FOG SIGNALS.

All Sea-going Steam Vessels, whether propelled by paddles or screws, when their steam is up, and when under-way, shall in all cases of Fog use as a Fog Signal a Steam Whistle, placed before the Funnel at not less than eight feet from the deck, which shall be sounded once at least every five minutes; but when the steam is not up, they shall use a Fog Horn or Bell, as ordered for Sailing Ships.

SAILING VESSELS.

1. All Sea-going Sailing Vessels when under-way or being towed shall between sunset and sunrise exhibit a Green Light on the Starboard side and a Red Light on the Port side of the vessel, and such Lights shall be so constructed as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and shall show an uniform and unbroken light over an arc of the horizon of ten points of the compass, from right ahead to two points abaft the beam on the Starboard and on the Port sides respectively.

2. The Coloured Lights shall be *fixed* whenever it is practicable so to exhibit them; and shall be fitted with inboard screens projecting at least three feet forward from the Light, so as to prevent the Lights being seen across the bow.

3. When the Coloured Lights cannot be fixed (as in the case of small vessels in bad weather), they shall be kept on deck between sunset and sunrise, and on their proper sides of the vessel, ready for instant exhibition, and shall be exhibited in such a manner as can be best seen on the approach of, or to, any other vessel or vessels, in sufficient time to avoid collision, and so that the Green Light shall not be seen on the Port side, nor the Red Light on the Starboard side.

FOG SIGNALS.

All Sea-going Sailing Vessels, when under-way, shall, in all cases of Fog, use when on the Starboard Tack a Fog Horn, and when on the Port Tack shall Ring a Bell. These signals shall be sounded once at least every five minutes.

PILOT VESSELS.

Sailing Pilot Vessels are to carry only a White Light at the Mast-head, and are to exhibit a Flare-up Light every fifteen minutes, in accordance with Trinity House regulation.

VESSELS AT ANCHOR.

All Sea-going Vessels when at anchor in roadsteads or fairways, shall between sunset and sunrise exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a White Light in a Globular Lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon, at a distance of at least one mile.

Given under our hands this 24th day of February, 1858.

CHARLES WOOD.

R. S. DUNDAS.

By command of their Lordships,
W. G. ROMAINE,
Secretary.

The following Diagrams are intended to illustrate the use of the Lights carried by vessels at sea, and the manner in which they indicate to the vessel which sees them the position and description of the vessel which carries them :—

FIRST.—When both Red and Green Lights are seen :

A sees a Red and Green Light ahead ;—A knows that a vessel is approaching her on a course directly opposite to her own, as B ;



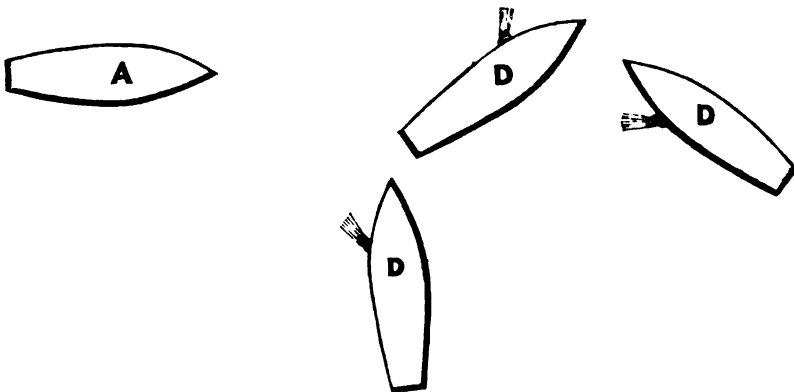
If A sees a White Mast-head Light above the other two, she knows that B is a steam-vessel.

SECOND.—When the Red, and not the Green Light, is seen :

A sees a Red Light ahead or on the bow ;—A knows that either,
1, a vessel is approaching her on her port bow, as B ;



or, 2, a vessel is crossing in some direction to port, as D D D.

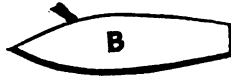


If A sees a White Mast-head Light above the Red Light, A knows that the vessel is a steam-vessel, and is either approaching her in the same direction, as B, or is crossing to port in some direction, as D D D.

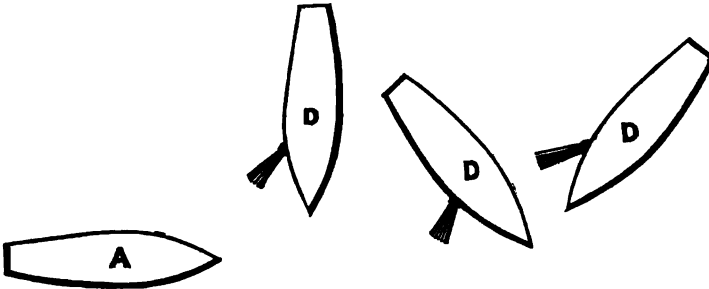
THIRD.—When the Green, and not the Red Light, is seen:

A sees a Green Light ahead or on the bow;—A knows that either,

1, a vessel is approaching her on her starboard bow, as B;



or, 2, a vessel is crossing in some direction to starboard, as D D D.



If A sees a White Mast-head Light above the Green Light, A knows that the vessel is a steam-vessel, and is either approaching her in the same direction as B, or is crossing to starboard in some direction, as D D D.

No. V.

22 & 23 VICT. Cap. 6.

An Act to enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to practise in the High Court of Admiralty.

[8th August, 1859.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

Serjeants, barristers, attorneys and solicitors, to be at liberty to practise in the High Court of Admiralty.

I. All serjeants and barristers-at-law, and all attorneys-at-law and solicitors, shall from and after the passing of this Act be entitled to practise as serjeants, barristers, attorneys, and solicitors respectively, in all matters and causes whatsoever in Her Majesty's High Court of Admiralty; and the said serjeants and barristers-at-law shall and may have and exercise the same rights and privileges of practising, pleading, and audience in the said High Court of Admiralty as advocates now have and enjoy in the said Court; and the said attorneys and solicitors shall and may have and exercise the same rights and privileges of practising in the said High Court of Admiralty as proctors now have and enjoy in the said Court; and all persons who, at the time of the passing of this Act, shall have been admitted advocates in any of the Ecclesiastical Courts, or in the said High Court of Admiralty, and the said serjeants and barristers-at-law, shall have respectively the same rank and precedence in the said High Court of Admiralty which they now have before the Judicial Committee of the Privy Council, unless and until Her Majesty shall otherwise order: provided always, that all attorneys-at-law and solicitors practising in the said Court of Admiralty shall be subject to the authority of the Judge of the said Court in like manner as attorneys in the Court of Queen's Bench are subject to the authority of that Court.

CASES

DECIDED IN THE HIGH COURT OF

ADMIRALTY OF ENGLAND,

AND ON APPEAL TO

THE PRIVY COUNCIL, (a)

THE CLARA, ATKINS, *Master*.

*Collision—Priority of Claims where several Parties are suing,
and the Proceeds are insufficient.*

Nature of proceedings in a cause of damage; liability of shipowners limited by statute. Of two plaintiffs in a cause of damage, the one obtaining the first decree is entitled to priority of payment from proceeds of the ship in Court; if the Plaintiff in a second suit is apprehensive that the value of the ship and freight will not satisfy the whole claim for damage, he must apply to the Court before any decree is pronounced.

THIS was a question arising out of two separate suits brought against the Clara for damage caused by collision; the first, by the owners of the ship Eliza; the second, by the owners of the cargo on board that vessel.

1855.

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On behalf of the owners of the ship the proceedings were as follows:—On 30th September, 1854, F. Clarkson entered an action on behalf of the owners of the Eliza in the sum of 2,000*l*. On 4th October Ring appeared to the action for the owners of the Clara, and extracted commission to take bail. On 12th October Ring returned commission with bail; both proctors agreed the value of the Clara at 1,250*l*., and a *supersedeas* was decreed. On 4th November Clarkson brought in his libel; on 14th November the libel was admitted, and witnesses were produced by Clarkson on the 13th, 14th and 18th December.

(a) The appeal is to her Majesty, Committee of the Privy Council, who and is by her referred to the Judicial report to her.

1855.

Nov. 20.

The suit was regularly prosecuted, and on the 3rd May, 1855, the judge pronounced for the damage proceeded for, condemned Ring's party and his bail therein, and in costs, and referred the same as usual. On 13th June Ring alleged that he had paid to the credit of the Registrar's Account at the Bank of England 1,283*l.* 14*s.*, being the agreed amount of the value of the Clara, and interest thereon.

On behalf of the owners of the cargo the proceedings were as follows:—Lawrie entered an action in the sum of 1,600*l.* on 13th December, 1854; Ring appeared also to this action for the Clara, and on 27th December returned commission executed with bail, and alleged the value of the Clara as above. On 23rd January, 1855, Lawrie prayed, and the judge at his petition, with consent of Ring, decreed that the judgment to be given in this suit should be of the same tenor and effect, so far as respects the interests of their respective parties, as the judgment to be given in the action brought by the owners of the Eliza against the Clara. On 3rd May the judge, on motion of counsel, referring to the minute of Court of 23rd January, pronounced for the damage proceeded for, and condemned Ring's party and his bail therein, and in costs, and referred the same to the Registrar and merchants as usual.

On 12th July the judge confirmed the Registrar's Report in both suits; and Clarkson then prayed that the whole of his party's claim should be paid in full out of the fund brought in by Ring, and remaining in the registry; this was objected to by Lawrie on behalf of owners of cargo, who prayed the judge to direct the proceeds to be paid *pro ratâ* to Lawrie's and Clarkson's parties. It appeared that Clarkson's claim, as allowed by the Registrar, was 755*l.*, that of Lawrie was 1,344*l.*, while the agreed value of the vessel condemned in the damage was only 1,250*l.*; thus it was of considerable importance, not only for this case, but as a question of principle, whether the claimants in equal degree were to be paid rateably, or whether the course of the proceedings entitled the owners of the ship to a priority of payment.

The *Advocate of the Admiralty* and *Swabey*, for the owners of the cargo, urged that the time at which Lawrie's action was entered, the minute of Court of 23rd January and the decrees of 3rd May, which in law must be considered as contemporaneous, distinguished the present case from that of the *Saracen* (a),

(a) 4 Notes of Cases, 498, and 2 W. Rob. 451.

and entitled Lawrie's party to a rateable payment of the sum in the Registry.

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Addams and *Twiss*, for the owners of the *Eliza*, contended that *Clarkson* was in possession of a prior decree, and, under the authority of the *Saracen*, was entitled to priority of payment to the full amount of his claim.

Dec. 4.

DR. LUSHINGTON now delivered judgment, and said :—Before stating the circumstances of this particular case, I think it may be convenient to make some observations of a general nature as to these causes of collision—or damage, as they are sometimes called,—though, in so doing, I must necessarily repeat to some extent what I have said in the case of the *Saracen*. We all know that the owners of ships and cargoes damaged by collision had formerly various means of obtaining redress for any injuries they might have received. Any person whose property had been destroyed or damaged might bring an action at common law against the owners of the ship in fault. Every person damaged might bring an action, and in each action the Plaintiff might recover to the full amount of the damage received. In the Admiralty Court there were two modes of proceeding,—by arrest of the person, or arrest of the ship. The proceeding by arrest of the person has now for many years been obsolete; I cannot exactly say how long, but I think there was a precedent in 1780; the amount of damage done was the only limit to the amount that might be recovered. The proceeding by arrest of the ship—or *in rem*, as it is called—was the most sure, for to the extent of the value of the ship the Plaintiff would be sure of any amount of damage decreed. If the ship remained in the custody of the Court, and was sold by its decree to pay the damage, of course the ship was not liable to a second detention; she was sold by the Court free of all demands; but if bailed, I know of no reason why she might not at that time have been arrested again at the suit of another claimant, nor why another claimant might not have proceeded, either at common law or in this Court, against the person. Thus things remained till the statute passed (a) limiting the liability of the owners of the ship doing damage to the value of the ship and freight; the legislature acting upon the principle that unlimited liability was prejudicial to the maritime interests of this country. The ship-owner, however, could not take the benefit of this statute

Judgment.

Nature of suits
for damage
from collision.

Action at
common law.

In the Ad-
miralty,
in personam;

in rem.

Ship sold by
decree of Court
freed of all
demands.

Quære, if
bailed.

Liability
limited by
statute.

(a) The 53 Geo. 3, c. 159. This statute was repealed by 17 & 18 Vict. c. 104; but similar provisions in regard to the limitation of shipowners' liability are enacted by the 9th part of 17 & 18 Vict. c. 104, the statute now in force.

1855.

Dec. 4.

Practice of
Admiralty
where several
plaintiffs suing.
Owners of
vessel damaged
generally in a
position to
bring their suit
first.

The bail to
first action not
responsible to
plaintiff in
second.

unless he followed the course pointed out by the statute. Thus, if A. B., the owner of a ship damaged, brought his action at common law, or here, he could only recover to the extent of the value of the ship; but if C. D., the owner of the cargo or part of the cargo, also brought an action, he, too, unless stopped by an order of the Court, or by the shipowner resorting to Chancery, would recover to the amount of the value of the ship and freight, and so it might go on *toties quoties*. If the suit were brought here by arresting the ship, the first Plaintiff, supposing no bail to have been given, would be entitled, of course, to have the vessel sold to pay him what was deemed to be due, and in such case the ship could not be arrested again; but I cannot say that, if the ship were bailed, another Plaintiff might not also have arrested her. No such case has however, as far as I am aware, occurred. In this state of things what was the practice in this court? When I say the practice, I do not mean to say practice in virtue of any rules, for I know of none; but I mean what was usually done. The owner of the ship damaged was almost universally the first to commence proceedings where the action was not on behalf of the cargo as well as the ship; and this was naturally so, because the owner of the ship had the control over his master and crew, and would have more accurate knowledge of the circumstances attending the collision—in short, the best means of maintaining his action. When the owner or owners of the cargo subsequently commenced any action, it was usual for the owners of the ship proceeded against to consent that such subsequent action should abide the fate of the first. Where the ship proceeded against was of sufficient value to satisfy all demands, no difficulty could occur. When, however, the ship proceeded against was not of sufficient value to answer all demands, some difficulty might arise. First, if the ship had been bailed to answer the first action, that bail could not be responsible to the Plaintiffs in the subsequent action. The same or different persons, as the case might be, might have given bail to the subsequent action. If the ship remained in the custody of the Court, it or its proceeds would of course be liable to all just demands. The question whether the bail to the subsequent action would be liable, notwithstanding the full amount of the value of the ship had been paid by the bail to the first action, has not, to my knowledge, ever been mooted. In the *Saracen* I thought it necessary to allude to the possible occurrence of such a question. When the ship itself remained in the custody of the Court, and several actions were brought before a decree was pronounced in any one of them, the Court—though I do not remember that it was ever

called upon to pronounce a formal decision—was always, so far as it had power, inclined to assist a proportionate distribution of the proceeds, and for obvious reasons:—first, because the owners of the cargo lost or damaged were almost by necessity invariably the Plaintiffs in the subsequent action, not having the same means of knowing the facts as the owners of the ship; secondly, because, if the proceeds of the ship were all paid out to satisfy the first action, this Court could afford no remedy to the Plaintiffs in subsequent actions; and, thirdly, if the ship proceeded against was a foreign vessel, the Plaintiffs in a subsequent action might be said to have no practicable remedy at all. In almost all cases, if not all, such course was acquiesced in. The whole effect of the statute already adverted to, I think, has not been fully understood in these Courts; at which I am not surprised, as it has never been the subject of any distinct discussion or adjudication. It was indeed well known that no one Plaintiff could recover more than the value of the ship and freight; but the condition of a second Plaintiff—whether without the intervention of a Court of Equity he would or would not be barred from succeeding in a second action, where the ship was bailed—was left in doubt and uncertainty. With respect to the case of the *Saracen*, I adhere to all I have said, as reported in the “Notes of Cases.” It is time that I should approach the facts of this case, and determine whether they fall within the principle of the decision in the *Saracen*, or whether any just distinction can be discovered. On the 30th of September, 1854, Mr. Clarkson entered an action on behalf of the owners of the ship damaged. On the 4th of October Mr. Ring appeared for the owners of the ship proceeded against, and gave bail to the amount of 1,250*l*. The cause went on in the ordinary way, and was heard on the 3rd of May, when judgment was given for Mr. Clarkson’s parties. On the 13th of June Mr. Ring brought in 1,283*l*. 14*s*., being the agreed amount of the value of the ship—agreed, I presume, by Mr. Clarkson and Mr. Ring, on behalf of their respective parties. On the 12th July the Registrar’s Report was confirmed. Mr. Clarkson then prayed that his claim should be paid in full out of the proceeds in the Registry. To this prayer Mr. Lawrie, on behalf of the South-Eastern Railway Company, owners of part of the cargo, objected, and his objections were heard by act on petition; and it is on the facts disclosed therein that I have to decide whether Mr. Clarkson is entitled to be paid in full out of the proceeds, in exclusion of Mr. Lawrie’s parties. I must now see what was done by Mr. Lawrie on behalf of the South-Eastern Company. On the 13th of December, 1854, Mr. Lawrie entered an action for 1,600*l*. This was after the

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Dec. 4.

Court always anxious to assist a proportionate distribution, before pronouncing its decree.

Facts of present case.

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Dec. 4.

The Court of Admiralty has no power to give effect to the equitable provisions of the statute.

Where proceeds are insufficient, application must be made to the Court before any decree is pronounced.

libel had been admitted, and on the same day that the witnesses were produced. On the 23rd December Mr. Ring appeared to this action, and gave bail to the amount of 1,600*l*. On the 23rd of January, at the prayer of Mr. Lawrie, and with the consent of Mr. Ring, it was ordered, that the decree in Mr. Lawrie's action should be to the same effect as that in Mr. Clarkson's, and on the 3rd May it was decreed accordingly. On the 12th July the report of the Registrar was confirmed. It does not appear from these proceedings that Mr. Clarkson was present, or in any way made a consenting party to the proceedings between Mr. Lawrie and Mr. Ring. It is upon this state of facts that I must in the first instance pronounce an opinion, and afterwards see whether there are set forth in the act on petition any circumstances peculiar to this case which ought to affect my ultimate judgment. It is now settled by the decision of the Privy Council in the case of the *Saracen* (a), that I have no power to carry into effect the equitable provisions of the statute. If I have any equitable jurisdiction in the matter, it must be by virtue of the authority inherent in this Court, antecedent to and independent of the statute. It is, however, difficult to act upon any such assumption, for it was the Act alone which gave rise to any equitable interference, by limiting the responsibility of the owners of the ship doing the damage. In the case of a foreign ship, indeed, there might always have been some necessity for enforcing an apportionment. It is perfectly true, however, that this Court has been anxious not only to prevent an accumulation of suits, but to give effect to an equal apportionment, where the damage done exceeded the value of the ship and freight. I am not aware, however, that I have ever made a formal order to that effect, and, more especially, not where application was made to the Court to interfere after it had made its decree. Here, now, I think there has been a misapprehension of what I said in the *Saracen*. It has been supposed that my observations applied to a case where the second action was brought before the decree in the first action was pronounced; and application made to the Court for its interference after the decree; whereas, my observations applied to application to the Court before any decree at all was made. I am glad to think these observations have been accurately reported in the "Notes of Cases." In the *Saracen* I stated that if the application were made before any decree in the cause, the Court might impose equitable conditions, as, that the party applying should in case of failure be responsible for a proportionate share of the costs. If such an offer were made, I do not know that I could absolutely enforce compliance with it; but I

(a) 6 Moore, P. C. 56.

should be greatly inclined, if it were refused, to facilitate the proceedings in the second action where there had been no delay, so as to pronounce a decree in both actions at the same time, and in such a form that both parties might share proportionately. In the present case, however, no application was made to the Court for its interference until after the decree had been made in the first cause, so that if Mr. Clarkson's parties had failed they would have been liable to the whole expenses, and it would, I think, have been contrary to all justice for the Court to give Mr. Lawrie's parties the benefit of the decree to the injury of Mr. Clarkson's, when Mr. Lawrie has incurred no risk. It is upon this principle that I must act on the present occasion, acknowledging at the same time that the whole of this matter is in a very unsatisfactory state, and that difficulties may arise which I have no power to overcome. Without expressing a positive opinion, I am inclined to think that where a ship is bailed any number of actions might be commenced in this Court, and prosecuted too, unless recourse were had to the Court of Chancery. Upon the whole I must reject Mr. Lawrie's prayer, and decree Mr. Clarkson's parties to be satisfied out of the proceeds. I give no costs.

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But where the second Plaintiff has kept himself free from liability to costs, he cannot take the benefit of the decree in the first suit to the injury of the first Plaintiff.

F. Clarkson, proctor for the owner of the ship.

Smale and Lawrie for the owners of the cargo.

THE EARL OF EGLINTON, HUTTON, *Master*.

Salvage Service by her Majesty's Ships of War.

Officers and crews of queen's ships are entitled to salvage reward; though the fact that their own property is not risked in such services will be taken into consideration. A larger proportion will be given where the property salvaged is of great value.

THIS was a suit promoted by her Majesty's ships *Penelope* and *Frolic*, with the permission of the Lords of the Admiralty (a), to obtain salvage reward for services rendered to the Earl of Eglinton in Simon's Bay, at the Cape of Good Hope, on the 21st of June last. The Earl of Eglinton, bound with a cargo of silk, hides, &c., from Calcutta to London, was forced by stress of weather to put into Simon's bay, where she came to anchor under the directions of the harbour master. The wind, however, shifted, and a squall coming on, the vessel

Dec. 6.

(a) See sects. 484, 485, of Merchant Shipping Act, 1854.

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Dec. 6.

was driven on shore and struck heavily on the beach. The Penelope, with a number of men from the Frolic, succeeded in getting her off, after which she resumed her voyage and arrived safely in England. The value of the property salvaged was 84,500*l*.

The *Queen's Advocate* and *Twiss* were heard for the salvors.

Addams and *Deane* for the owners.

Judgment.

DR. LUSHINGTON:—This is a case in which the Court is called upon to adjudicate what is a proper reward to be given for services rendered by ships in her Majesty's service, and by her Majesty's servants employed on board them. No doubt different considerations apply to such a case, and to the more ordinary cases where the service is performed by persons at their own risk and at the risk of their property. All the facts are admitted on both sides. That the vessel was in great danger cannot be doubted. She could not let go another anchor, and the only means by which she could be rescued, except with the assistance of a steam vessel, was by unlading part of her cargo, and then, with the assistance of boats, carrying out an anchor. If the weather had become boisterous, she would have been placed in considerable peril. The time occupied in the service was nine hours only; but it has been very truly said that that was owing to the power of the vessel employed, and the effectual aid that was rendered. With regard to any serious peril to the lives of those engaged in this service, I do not know that there is any evidence on which I can rely; though there might have been times when there was risk to life. It must be remembered that, in a case of this description, the Court gives a greater reward on account of the value of the property, because it is less felt by the owners. According to a principle laid down over and over again by my predecessors, something more should be given, because on many occasions salvors perform great services, where the property is small, without adequate remuneration. I do not think I shall give too much by awarding 2,000*l*, and costs.

Burchett, proctor for her Majesty's ships.

Orme for the Earl of Eglinton.

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THE GENERAL DE CAEN, GUICHON, *Master*.

*Collision—Compulsory Pilotage—Exemption under Sect. 388
of Merchant Shipping Act.*

A French vessel coming up the Thames took on board a pilot, and, as none of her crew understood English, a waterman to take the wheel. The waterman put her helm up instead of luffing, as the pilot ordered, whereby a barge was run into and damaged; the French owner claimed exemption under the 388th section of the Merchant Shipping Act; held, that the pilot was not answerable for the waterman's incapacity or fault, and that the section of the Act, inasmuch as it deprives parties injured of a remedy they would otherwise have had, should be construed strictly.

IN this case, a French vessel, the General de Caen, coming up the Thames under charge of a duly qualified pilot, ran into and damaged a barge lying at anchor off Gravesend. As to the fact of the collision, and that the French vessel was in fault, there was no dispute; but her owners claimed to be protected under sect. 388 of the Merchant Shipping Act, 1854, which enacts, that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law." The owners of the General de Caen admitted that the pilot, under the circumstances, gave the right order, but asserted that the collision arose from that order not having been properly carried out by the man at the wheel, who was an English waterman hired to accompany the vessel up the river, as none of the crew spoke English, at the request and desire of the pilot, and ordered by the pilot to go to the wheel; that this man must be considered to be the pilot's servant, and that the pilot would be responsible for the misconduct or inefficiency of the waterman, so hired and under his orders, as if it were his own.

The owners of the barge damaged denied that the waterman was hired by the pilot, or that the pilot was in any way responsible for him, but asserted that the waterman was hired by Mr. Davis, the agent of the owner of the vessel, who was on board, and by the master.

The Court was assisted by Captains *Gordon* and *Pitcairn*.

The *Advocate of the Admiralty* and *Bayford* appeared for the owners of the General de Caen.

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Twiss and Swabey, contra, were not called upon.

Judgment.

17 & 18 Vict.
c. 104, s. 388.

To exempt the
shipowner the
pilot must be
solely to
blame,

and must be
acting in
charge of the
ship.

Facts of the
case.

DR. LUSHINGTON, addressing the Elder Brethren, by whom he was assisted, said:—Gentlemen, this case has been argued with very great pains and much ingenuity, but I confess that my original impression, that this defence was wholly untenable, is not in any degree removed. This is the first time that the 388th section of the Merchant Shipping Act has come under the consideration of this Court, and you will, therefore, excuse me if I make some observations upon it. We are all aware that in former times, if damage was done by one ship to another, the owners of that ship were liable, whether there was a pilot on board or not. It is only by virtue of Acts of Parliament, which render it compulsory upon them to take a pilot on board, that owners are exempted where the blame is attributable solely to the pilot. The question is, whether the pilot is to blame for the present collision, according to the true meaning and intention of the section cited. You are aware that, if the pilot is solely to blame for this collision, the owners of the *General de Caen* will be exonerated, and those who received the mischief will have no means of obtaining a remedy except by proceeding against the pilot himself—a remedy that is not very often effectual. The words of the Act are, “No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship.” Therefore, what we have to determine is, whether the collision in this case was occasioned by the fault of any qualified pilot acting in charge of such ship, for incapacity on the part of the pilot is clearly not alleged. Now, gentlemen, I should be very reluctant, and I think it would be contrary to all principles of justice, to extend the meaning of this section beyond its fair construction, because, though this Act of Parliament was framed, as you perceive, for the purpose of protecting the ship owners of this country, yet you must always bear in mind that it takes away a remedy from persons who have received injury; therefore its provisions must not be extended. The fault is “acting in charge of such ship:” no other fault committed by the pilot, whatever it may be, can in any degree be comprehended in the terms of the statute; and, perhaps, that will not be an unimportant observation when I come to look at the facts of the case and comment upon them. The facts are, as set forth by the barge, that she was run down by the *General de Caen*. It is admitted that the barge was run down by the fault of Brown, who was at the helm, and who, contrary to the pilot’s orders, put the helm up, instead of luffing,

The defence is, that Brown was hired on the recommendation of the pilot, and by the pilot was sent to the wheel; and that therefore the collision is to be attributed to the fault of the pilot. Now, how stand the facts? By whom was Brown hired?—because that is the first question of fact in this case. I never heard it argued at all that the pilot had any authority to hire men, custom or no custom. Supposing that it is the custom for foreign vessels, and French vessels in particular, to take a waterman in addition to a pilot to navigate a vessel from Gravesend to London, the pilot has no authority to hire him; he could not bind the owners by any engagement he made. The witness Davis makes the matter clear. He says, “as neither the man at the wheel nor any of the crew except the master understood English, and he but very little, the pilot wished the master”—not unnatural nor unreasonable in the slightest degree —“to engage Brown to assist him; but the master was reluctant to do so, and asked me if it was usual to have a waterman as well as a pilot. I replied that foreign vessels always took a waterman on board who could understand the pilot’s orders; whereupon the master told me that Brown wanted 1*l.* to go up with the vessel. The pilot then said that Brown would go up for 15*s.*; whereupon I replied, he can have that.” That is a direct hire by the master, the agent of the owners, and, of course, that is hiring not by the pilot himself, but by the owners. “The pilot immediately called to Brown, who was then aft. ‘You are engaged, you are to have 15*s.*,’ and desired him to take the wheel, and send the French sailor away.” Upon that there is some dispute; but admit for a moment that the pilot was anxious that Brown should be employed, recommended it, and, if you please, urged it upon the master, why he did no more than Mr. Davis says is the ordinary and usual custom. This waterman was sixty-five years of age; the pilot had no reason to suspect that the man was utterly ignorant of his duty; it would be pressing the case infinitely too far to say that he was responsible for that recommendation. The second fault imputed to the pilot is, that he ordered Brown to take the wheel, sending away the French sailor. We will assume that to be so. Pray, gentlemen, what was Brown hired for? Was he not hired for this very express purpose, because he was a waterman experienced on the River Thames, because he understood English, and could comprehend the orders of the pilot? There could be nothing more absurd than to take a pilot on board for the very purpose of steering, and then to leave a French sailor at the wheel. It appears to me that he did that which every man of common sense would do under the circumstances. This being so, it is

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Dec. 8.

Pilot had no authority to hire the waterman,

who was in fact engaged by the master.

Pilot not responsible for recommending him.

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Dec. 8.

said in the act on petition—though it has not been much noticed in the argument—that he ought to have given special instructions to the waterman as to the mode of steering the vessel. But there were no instructions to give. The tiller was not in the same state and condition as is usual on board French vessels, but the same as it is in English ships, with which the waterman was conversant. The pilot gave his proper orders to luff, but the man, by some unaccountable mistake, misunderstood the order, and did the opposite to what he was told. It would be contrary to justice to say that the pilot was solely liable for this collision; the responsibility must rest on the owners, whose servant Brown undoubtedly was. I pronounce, therefore, for this damage, and of course with costs.

Bathurst, proctor for the barge.

Rothery for the General de Caen.

THE PEPPERELL, JORDAN, *Master*.

Collision—Fishing Cutter, with Trawl down—Rate of Speed during dark Night.

In case of collision between a cutter with her trawl down, and a ship under sail, the presumption is against the latter sailing at six-and-a-half knots on a very dark night, and aware that she was crossing a fishing-ground.

Dec. 8.

THIS was a suit promoted by the carrier cutter *Leander* against the American ship *Pepperell*, to recover the loss arising from a collision between them in the North Sea, about twenty miles to the eastward of Smith's Knowl, at 1.45 a. m., on the 16th of September last. The cutter was engaged in fishing with her trawl down when she was run into by the *Pepperell*.

Haggard and *Jenner* appeared for the *Leander*; *Addams* and *Curteis* for the *Pepperell*.

Judgment.

DR. LUSHINGTON:—This is a suit brought by the fishing cutter *Leander*, which was run into by the *Pepperell*, an American vessel, of the burthen of 670 tons, early on the morning of the 16th of September. She had a light up, as the other fishing vessels had. All the evidence demonstrates to my satisfaction that she had a light hoisted; and it is also said, although I do not think it an important ingredient, that she showed a turpen-

tine light as soon as she saw the Pepperell, at a considerable distance. The ground on which my judgment will be founded is this: the Pepperell was going six-and-a-half knots an hour, stating at the same time that the night was so dark that she could only see vessels at the distance of 100 to 200 yards off. She ought to have known that she was crossing a fishing-ground, and indeed she did know it, for she states that shortly before the accident she saw many lights. From that circumstance alone, that she was going through the water at that rate at that season of the year, the Court will pronounce for the damage.

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Jenner, proctor for the cutter.

Engleheart for the Pepperell.

THE FENIX.

*Salvage—Abandonment—Certificate for Costs under Sect. 460
of Merchant Shipping Act.*

When on the alarm attending a collision the crew of one vessel jumps on board the other, such abandonment does not of itself constitute a case of derelict. Questions of agreement, or charges of misconduct brought against the salvors, will be grounds for the Court to certify for costs where the sum awarded is less than 200*l.*—*secus*, when ordinary salvage suits are brought before it contrary to the intention of the Merchant Shipping Act.

THIS was a suit instituted by the steam-tug Charm and two luggers, the Fly and the Dart, to obtain salvage reward for services rendered to the brig Fenix on the 19th of August last. The Fenix having come into collision with another vessel in the Gull stream, the Fly proceeded towards them with the view of rendering assistance. Before the Fly came up the vessels separated, and the brig, her crew having got on board the vessel with which she came in collision, drifted towards the Goodwin Sands. The crew of the Fly succeeded in boarding her, after which the Charm came up and took her in tow. The Dart was subsequently engaged to assist in the service, which lasted three hours, and terminated in conducting the brig safely to Ramsgate.

Dec. 20.

On the part of the owners it was admitted that a valuable service had been rendered, but it was contended that there had been a want of skill displayed by the salvors which materially

1855. detracted from its merit. The value of the property saved
 Dec. 20. was 800l.

Bayford and Deane were heard for the salvors.

Twiss and Spinks for the owners.

Judgment.

Facts of the
 case.
 Collision; and
 abandonment
 of Fenix.

DR. LUSHINGTON:—The present claim is preferred on behalf of the *Charm*, which is a small steam-tug of 50-horse power, and also on behalf of two luggers, having, as they contend, rescued the *Fenix* from imminent danger, after she had been in contact with a large ship called the *Mobile*. It appeared that at mid-day, on the 19th of August, by some unaccountable neglect, the *Fenix* came in contact with this ship—the *Mobile*; the *Fenix* being a brig of between 200 and 300 tons, and the *Mobile* a vessel of 1,000 and odd tons. These two vessels came into contact in the Gull stream, in consequence of which, of course, the smaller vessel received the greater damage. What degree of damage had been received it was difficult, if not impossible, to ascertain at the moment, and for a very obvious reason—all the persons on board the *Fenix* were necessarily much excited at the prospect of immediate danger, and they jumped on board the *Mobile*. The vessels were separated by cutting away parts of the rigging that held them together—and here I may observe, that where vessels are separated, and cutting away takes place, it is not very probable that any of the parties will be able to give any distinct account of the *quantum* of cutting away at the time. However, the two vessels did separate and the *Mobile* proceeds on her voyage, without stopping to inquire what had become of the *Fenix*. The *Mobile*, so far as I can judge from these proceedings, having a favourable wind, was desirous of prosecuting her voyage with expedition, and she never ceased, or in any degree slackened, her speed on that occasion. All she did was this—she hoisted a signal for a steam-tug—whether any special signal has been a question much disputed on the present occasion. I should think it probable that the signal was not hoisted till after the collision, and for this reason—it does not appear that the *Mobile* stood in need of any steam-tug at all, and more especially one of these small dimensions, she being of such great size. It is said, in the first place, that it was the duty of the *Charm*, when she saw the signal hoisted on board the *Mobile*, immediately to go to that vessel and not to the *Fenix*. It seems to have been supposed, by those who made this statement for the *Fenix*, that, somehow, the crew of the steam-tug ought to have understood that the

crew of the Fenix, then on board the Mobile, were desirous of going on board their own vessel again. It is true they had seen the collision take place at a distance; they saw from the mode in which the Fenix was going, that it was probable she was abandoned; but I do not see how they could arrive at the conclusion with certainty that the signal was made for them to take back the master and crew, for they could not know the damage to which the Fenix had been subjected. In fact, they were in perfect ignorance of everything except that a collision had taken place. However this may be, I am of opinion that there was no obligation on the Charm to have abandoned the Fenix—for that is the expression that has been used; on the contrary, they did that which was most natural, they saw the vessel in distress, and whatever the state of the wind and the weather, being so left without any person navigating her, they were justified in going to the Fenix, which they found in possession of the crew of a small lugger, called the Fly. They united with the crew of that lugger to save the Fenix, and were afterwards joined by the persons from on board the Dart. With regard to the abandonment entitling the salvors to such a proportion as is generally given in cases of derelict, I am clearly of opinion that they can claim no such thing, because the vessel was not abandoned in consequence of being utterly incapable of being navigated or because she was not seaworthy; it was merely from a sense of imminent danger, not knowing what the consequences of the collision might be. It was an abandonment for the security of the person, accompanied with an intention of returning, provided that life should no longer be in danger. I cannot, therefore, consider this case to be placed in the category of ordinary cases of derelict. What is the next point? The Charm proceeds to tow this vessel to the port of Ramsgate, and she is charged by certain pilots, in their affidavit made on behalf of the owners, with having run away with her to Ramsgate, for that is the expression they use. That is a most extraordinary expression to employ, considering that the vessel went six miles in four hours. It is an elopement at the very lowest rate of speed of which I ever heard. However, she carries her in safety to Ramsgate, and the vessel is saved. It is contended on the part of the salvors that they have been charged with gross misconduct; the owners now say there has been want of skill, but as for misconduct we never charged it. I must say that I think, from the evidence and the affidavits of these two pilots, who swear to the utmost extent they can go, who swear to inferences of which they were totally and entirely ignorant, that there was an intention to charge the salvors, if possible,

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The salvors
take possession.

Abandonment
not necessarily
a case of derelict.

Charge of
misconduct
against the
salvors.

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Not proved.

Costs under
17 & 18 Vict.
c. 104, s. 480.

Court will not
certify in ordi-
nary cases;

but will certify
in cases of
difficulty,
where there are
agreements, or
charges of mis-
conduct, &c.

with gross misconduct. They may not have shown the greatest skill and ability under the circumstances, but they carried the vessel to a port of safety as rapidly as they could. I am of opinion that the services were valuable, and that they are not detracted from by anything that appears in the case. Then we come to the *quantum*. Looking at the number of persons engaged, and the time occupied, I am of opinion that 150*l.* will be an ample reward. This brings me to the question of costs. I am forced to look at the Act of Parliament, and I am reluctant to raise a question which may hereafter require considerable deliberation. I mean in this case to give costs to the salvors. If the act does not apply to this case, costs will follow as a matter of course; but if the circumstances bring the case within the meaning of the act, I have enough to justify me in certifying that it is a special case, and for the following reasons:—if the case were a simple one, having reference merely to the *quantum* to be assessed, to the time the service occupied, the dangers incurred, and so forth, I would not certify in a case of that kind, for I am compelled to carry out the Act of Parliament, and it is my duty to do so with perfect candour; I will never certify where I think the case ought not to have been brought here, and where there is not some difficulty. But in all cases of agreements, which are matters of difficulty for justices to decide; in all cases where there are charges, as on the present occasion, for not going to the *Mobile*, as to the mode in which the *Fenix* was navigated, and as to whether the salvors were not guilty of misconduct or neglect, I think it is but fit that the Court should certify, because it must have been the intention of the legislature that in some cases it should certify, and there are none where there are more difficulties than in these. In this case, then, I give 150*l.*, and, if needful, I am ready to certify that it is a proper case for costs.

Deacon, proctor for the salvors.

Rothery for the *Fenix*.

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THE CALEDONIA, McDOWALL, Master.

Claim for Master's Wages under Sect. 191 of Merchant Shipping Act, 1854—Former State of the Law—Course of Proceeding under the present Statute.

The master must bring his claim for the whole amount of wages due, and cannot, in the first instance, go into any account between himself and the owners. The owners may either pay the wages claimed, or go into the whole account between themselves and the master. The mortgagees in possession can be in no better position than the owners—but 50*l.* paid by them on account of wages since the vessel came into their possession was held not to open up the whole account incurred between the master and owners.

THIS was a cause of subtraction of wages, promoted by James McDowall, late master of the ship *Caledonia*, against the said ship and freight, and also against Alexander Macfarlane and David Forsyth, the mortgagees in possession of the said ship. In April, 1854, McDowall was hired by Archibald Galbreath and Co. to command the *Caledonia* on a voyage to Melbourne, &c., and back to a port in Great Britain, at the wages of 200*l.* per annum, and a commission of 2½ per cent. on the net profits of the voyages. The vessel proceeded on the voyage, and returned to the port of London, under McDowall's command, about the 25th July, 1855; on the 3rd August she was taken possession of by Messrs. Macfarlane and Forsyth, as the mortgagees, and McDowall was suspended or discharged from the command. Being unable to obtain payment, McDowall entered an action in the Admiralty Court, in the sum of 1000*l.*, and arrested the ship and freight. An appearance was given for the mortgagees in possession, and the vessel was bailed. The action was entered at 1000*l.* in order to cover advances made by the master on account of the ship and bills of exchange drawn by him on his owners, Galbreath and Co., for which he had now become liable. The master's claim for wages and for the balance of account with the owners was set out in a summary petition, which on the 14th November the Judge directed to be reformed by omitting everything except what related to the wages. Sect. 191 of the Merchant Shipping Act, 1854, under which the master is entitled to sue for his wages, provides, that "every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman not being a master has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to

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wages, any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

The amount claimed for wages and commission in the amended petition was 316*l*. The mortgagees admitted certain wages to be due, declared they had no intention of setting up any right of set-off or counterclaim, but tendered the sum of 150*l*. in full satisfaction of all such wages, together with such costs as are due by law. They stated that 5*l*. had been paid to the master on account of wages, by the owners, previous to the voyage, and that certain other sums had been received by his wife from the same owners during his absence, and that 50*l*. had been paid to him on account of wages, since the vessel had been in possession of the mortgagees, by their agents; they also disputed the amount of profit on the voyage, on which he claimed 2½ per cent. as part of his wages.

Deane appeared for the master.

Twiss for the mortgagees in possession.

Judgment.

Master's claim
for wages.

Under 7 & 8
Vict. c. 112,
s. 16,

the Court could
not enter into
any account
between him
and the owners.

DR. LUSHINGTON said :—It is of importance that there should be a clear understanding how a master's claim for wages stands. Originally the master had no right to resort to the Court of Admiralty for his wages, or for anything due to him from the owners (*a*); differing entirely from the seamen in this respect, his claims were considered as having no reference whatever to the ship. The first change made was by 7 & 8 Vict. c. 112, s. 16, which gave masters, in case of the bankruptcy or insolvency of the owner of the ship, the same remedies as seamen in regard to the recovery of wages due from the owner of any ship being a British subject. A difficulty occurred under this Act. It was customary for advance of wages to be made to seamen, but they never made any payment on account of the ship; whereas it is continually the case, that part of the master's wages are paid, say to his wife, during his absence on the voyage, and that he on the other hand makes considerable disbursements on behalf of the ship, and a running account is kept between him and the owners. Now this Court, under the 7 & 8 Vict., had no power to go into any such account between the owners and master; it was obliged to deduct from the wages claimed advances of wages

(*a*) Abbott on Shipping, part 5, c. 4.

paid, but could not give the master the advantage of considering any advances or payments made by him on behalf of the owners. It came to this, that the owners might gain, but could never lose, by such a proceeding. This is remedied by the 191st section of the Merchant Shipping Act, and the law now stands thus: the master in the first instance can only claim his wages; he, at first, has no power of opening up any running account between the owners and himself; and if the owners pay the sum so claimed for wages the master's mouth is stopped, at least in this Court. But if the owners choose to avail themselves of any advances made by them, or anything in the nature of set-off, they can only do so at the risk of going into the whole account between the master and themselves, and the Court has the power to direct payment of any balance that may be found due. Now, in the present case, the mortgagees can be in no better position than the owners. What they are attempting is most unfair, and would defeat the whole intent of the statute; they, in fact, say, We will pick out of your account with the owners just such items as suit our purpose, but will have nothing to do with the rest. This the Court will never consent to, and cannot, unless the whole account is to be gone into, take any notice of the sums so paid by the owners on account of wages, either to the master or his wife. As to the 50*l.* paid by the mortgagees since the conclusion of the voyage, the Court views it in a different light. The mortgagees in possession were no parties to the account between the master and the owners; they were not liable in action at common law or in suit at equity. In this proceeding against the ship their liability was for the wages alone, unless they chose to go into the general account, which the Court will not presume they intended, because they paid 50*l.*, after the conclusion of the voyage, on account of their own liability. As to the amount of commission, it must be referred to the registrar if the parties cannot agree. I pronounce for the wages, less 50*l.* paid by the mortgagees, with costs to the present time.

Nicholl, proctor for the master.

Bathurst for the mortgagees.

1855.
Dec. 20.

Under 17 & 18
Vict. c. 104,
s. 191,

the Court has
power to
adjudicate on
the account, if
the owners wish
to go into it;
otherwise will
decree the
wages shown to
be due.

1855.

Dec. 22.

THE JULIANA, T. CLEGHORN, *Master*.*Collision—Non-Exhibition of Light at Night—Lapse of Time in bringing Action.*

A fishing sloop was run down at night about ten miles off the Eddystone light, and sunk; held, that she could not recover in an action for damage, for she saw the other vessel at some distance, but showed no light herself, as directed by the Admiralty regulations (a), issued in pursuance of the 295th sect. of Merchant Shipping Act; the opinion of the Court being that if she had shown a light the collision would not have taken place.

THIS was a suit promoted by the trawl sloop *Fear-not* against the bark *Juliana*, to recover for a total loss occasioned by a collision between them, at 9 p. m. on the 24th of November, 1854, about ten miles from the Eddystone lighthouse. The sloop was proceeding to her fishing-ground close-hauled on the starboard tack, when she observed the barque, according to her account, distant about half-a-mile, steering down Channel free before the wind. The barque, according to the sloop's statement, altered her helm three times, and finally ran into her, in consequence of which she speedily sank, the crew being saved by boarding the barque. The barque, of the burthen of 246 tons, bound from London to Dominique, denied that she had so altered her helm, and attributed the accident to the sloop not exhibiting a light.

The Court was assisted by Captains *Farrer* and *Owen*.

Robinson and *Bayford* appeared for the sloop; *Addams* and *Twiss* for the barque.

Judgment.

DR. LUSHINGTON, without hearing counsel for the *Juliana*, or formally summing up the case to the Elder Brethren, said:—We are of opinion that it is impossible that this action can be maintained against the *Juliana* under the circumstances which are stated in this evidence; and, without any reference at all to the testimony of the witnesses who have been examined on the part of the *Juliana*, let us consider for a moment what is the evidence given and the statements made on behalf of the *Fear-not*, the vessel which was unfortunately destroyed. According to their statement it was a clear and starlight night. Now the representations with respect to the weather made on the one side and on the other generally require to be taken with some deductions;

State of night
and weather.

(a) See App. 1.

but, for the purpose of the present argument, I will presume it to be a clear night—not particularly dark, not particularly clear. There were two persons only on the deck of the sloop, the master being below and asleep; the boy not being proved where—one statement being that he was counting the fish and putting them aside, the other that he was with the master, and probably asleep too; but that is of no importance. She was in charge of the mate, and one other person, a boy about nineteen, the apprentice. They say they saw this large vessel (nearly 300 tons) coming down channel, with a light clearly exhibited, and, according to their statement, it was about a quarter of a mile distant. They had ample opportunity to have hoisted a light themselves, if they had thought fit so to do. Why did they not do it? They give two reasons; first, it might have puzzled a vessel coming down channel, secondly, they did not think it necessary under the circumstances of the case. I am not going to dwell on the fact of the *Juliana* having been discovered at so short a distance by those on board the sloop, for that would go into another part of the argument; at the same time I should observe, that there is a great difference as to time and distance; some of the witnesses say that from ten minutes to a quarter of an hour elapsed before the collision; others say that they saw her a quarter of a mile off. Under these circumstances the collision took place. I now come to the Act of Parliament. I wish I could use any terms strong enough to induce those who navigate vessels round the coast to believe that they must pay attention to this Act of Parliament. I regret that on so many occasions the Court has seen how greatly this Act of Parliament has been disregarded. Many cases have been made to turn on the point I am discussing,—the omission to hoist a light when another vessel was seen to be approaching. Then comes another question, whether the omission to hoist a light was or was not the occasion of the collision. That leads to a disquisition, very often a nice disquisition, of circumstances, the evidence respecting which is entirely conflicting, and it is exceedingly difficult to come to any safe conclusion. But there is one conclusion to which the Court can come, namely, that the safeguard which the legislature intended to provide has been neglected. The 298th section of the Merchant Shipping Act is in these words:—"If, in any case of collision, it appears to the Court before which the case is tried that such collision was occasioned by the non-observance of any rule for the exhibition of lights, or the use of fog signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rules as to the passing of steam and sailing ships, or of

1855.
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The sloop
shows no light
on seeing the
Juliana.

Necessity of
obedience to
the statute.

Was the omi-
sion to hoist a
light the occa-
sion of the
collision?

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If "yes," the
action cannot
be maintained.

Evidence taken
after a lapse of
time can be
very little de-
pended upon
for detail of
circumstances
in a collision
cause.

the foregoing rule as to a steam ship keeping to that side of a narrow channel which lies on the starboard side, the owner of the ship by which such rule has been infringed shall not be entitled to recover." The simple question is, whether, on this evidence, the Court, and the gentlemen by whom it is assisted, believe that the collision was occasioned by the non-observance of that rule? We all know that such a night, as it is stated to have been, requires the exhibition of a light when you see a vessel approaching. How are we to try the probabilities of this case, supposing that a light had been exhibited? If a light had been exhibited, under the circumstances does it not almost amount to a certainty that those on board the *Juliana* would have seen the fishing sloop in time, and would have avoided her? Then, what is the other conclusion to which the Court must come? If the exhibition of a light would have prevented the collision, surely the non-exhibition of it was the occasion of the collision. Of that I can entertain no doubt, and the gentlemen by whom I am assisted are of opinion with myself, therefore, that the action cannot be maintained. I do hope that this, among other instances, may be a warning to all those concerned in shipping matters, that they must attend to the provisions of the Act of Parliament; if they do not, and vessels are run down, they can neither recover in this Court nor in any other court whatever. Great inconvenience has arisen in this case from delay in bringing the action; the inevitable consequence of such delay is, that the testimony of the witnesses does not deserve credit. There is one of these witnesses, an apprentice on board the sloop, who I believe intended to give his evidence with perfect correctness. After it had been taken in chief he corrected it, but it is manifest that in two particulars he had no recollection of the facts and circumstances. He says: "I beg to say, that though I have sworn I called the master to get up to save his life, though I have sworn that I gave my hand to the boy to save his life, yet, upon recollection, I do not know that I did any thing of the sort." That shows that after such a lapse of time there is no possibility of relying on the testimony of the witnesses, either on the one side or on the other. I must dismiss the suit with costs.

Tebbs, proctor for the sloop.

F. Clarkson for the *Juliana*.

1856.

Jan. 8.THE CLYDE, JAMES WATT, *Master*.*Objection to Report of Registrar and Merchants—Collision—
Total Loss—Principles of estimating Value—Evidence.*

The Court will not interfere with the report of Registrar and Merchants unless it is fully convinced that they are in error. The principle of estimating damage is *restitutio in integrum*. In case of a total loss the market value of the ship just prior to the collision is what the owner is entitled to. The owner's affidavit of prime cost, unsupported by documentary proofs, is not sufficient evidence to produce legal conviction.

THIS was originally a cause of collision promoted by the collier schooner *George and Eliza* against the steamer *Clyde*. When the case came on for hearing, the Court, assisted by Trinity Masters, came to the conclusion that the steamer was the wrongdoer, and referred the case to the Registrar and Merchants to ascertain the amount of damage done. A claim was made for the schooner, amounting to 2,800*l.* which they reduced to 1,830*l.* and reported accordingly. Objection was now taken to their report.

Addams and *Twiss* appeared in objection to the report.

Haggard and *Robinson* in support of it.

DR. LUSHINGTON:—The present question arises in consequence of a collier schooner, named the *George and Eliza*, of 125 tons registered burthen, belonging to the port of Faversham, having been run down by the steam-vessel the *Clyde*. When the case came on to be heard by the Court, with the assistance of Trinity Masters, it was of opinion that the *Clyde* was to blame for that collision, and, consequently, that the owner of the schooner must be recompensed for the loss he had sustained. The present question is what the loss really was which he suffered in consequence of the collision. The owner of the *George and Eliza* made a claim amounting to 2,800*l.*, which claim was considered by the Registrar and Merchants, who had the benefit of having the owner before them, and also other evidence, and they reduced the claim to 1,830*l.*—taking off, therefore, 970*l.* What the Court is under the painful necessity of deciding is, whether the Registrar and Merchants were correct in the deduction they made, or whether the Court ought to make any and what addition to the sum they have allotted as the sufficient value of the vessel. As to the principle upon which the Court proceeds in these cases,

Judgment.

Principles of
compensation
in case of
damage by
collision.

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The leading principle is *restitutio in integrum*.

Partial damage.

In cases of total loss, the Court looks to the market price at the time of the loss.

How to ascertain this? Cost of building one element,

but affected by deterioration, and the rise and fall of the market.

there is, I apprehend, no doubt whatever. That has been laid down in the *Gazelle* (a), namely, that wherever damage is done by one vessel to another, the parties are to be restored into the same state as they were before the accident; that is to say, they are to have the full value of the property lost; *restitutio in integrum* is the leading maxim. The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be its market price. It was stated by Dr. Twiss, referring to the *Gazelle*, that a party was in a better situation who received only partial damage, than one whose property was totally destroyed. That is undoubtedly true, but it does not affect the principle. In case of partial damage, the party claiming to be restored *in integrum* gains the advantage of having sound timber put into the vessel, instead of that which had been deteriorated by wear and tear. That arises from the necessity of the case. You could not select timber of the same kind as that which was in the vessel before the collision; you could not ascertain what degree of deterioration had taken place, nor could you put the vessel precisely in the situation in which she was before. I therefore stated in the *Gazelle* that the ordinary deduction of one third of the cost of the substitution of new timber for old, which it appears had been the practice, could not be maintained; but that is not applicable to this case. I was entirely supported in that judgment, though the practice of the Court had been to the contrary, by the decision of Mr. Justice Cresswell at Newcastle, and which was afterwards supported at common law. There was another case which came before the Court where the vessel was totally lost and destroyed (b). A claim was made for consequential damage, but the Court held it had no discretion in the matter. All the remedy it could give was that of putting on the vessel at the time she was lost a market price; whereas, in cases of partial loss, there are other claims, such as demurrage, and so on, which are always compensated. Therefore, what we have now to look at is, what would the vessel have fetched in the market at the period of its destruction. In order to ascertain this, there are various species of evidence that may be resorted to—for instance, the value of the vessel when built. But that is only one species of evidence, because the value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But

(a) 3 Notes of Cases, 75.

(b) Columbus, 3 W. Rob. 158.

there is another matter infinitely more important than this—known even to the most unlearned—the constant change which takes place in the market. It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, “The worth of a thing is the price it will bring.” Under these circumstances the Court is called to review the report of the Registrar and Merchants—or, in other words, the Court is called on to act in the nature of a court of appeal, because this case has already undergone investigation by persons fully competent to form an opinion themselves. It has been investigated by the Registrar, who is accustomed to look at questions of this kind, which seldom come before the Court; and it has also been investigated by the two gentlemen who attended him, one of whom is very conversant with shipping. The Court, before it would reverse a report of the Registrar and Merchants made under such circumstances, must be convinced in its own mind that they have miscarried, and that what they have brought in as the value of the vessel is really and truly insufficient. It is not in a case of doubt that the Court would be justified in reversing a report of this kind. There may be many reasons for this. Not only are merchants more competent to tell the value of property of this description than the Court could be if left to its own decision, but they have the advantage of hearing evidence with minds prepared by their knowledge and experience to judge of it—knowledge and experience which the Court can only pretend to have in the most inferior degree. That is not all: they have the opportunity of examining those who bring in the claim—of examining the owner of the ship, asking what questions they think fit to put—and they have power to call for documents in support of the claim made. These furnish the strongest reasons why no Court should reverse a report of this description, except upon very strong and conclusive evidence. At the same time I fully admit that it is the duty of the Court, when an objection is taken, to look narrowly to the whole thing. It is its duty to decide the question by evidence; and it is the duty of the Court, if it wholly disagrees with the judgment of the Registrar and Merchants, to do justice to the parties, and to alter the report they have made. This brings me to the evidence. The first criterion on which it appears much reliance has been placed by the owner of the vessel is the original cost, which he states in his affidavit to amount to 3,070*l*. Let me not be misunderstood. In the observation I am about to make, I by no means intend to assert that this gentleman, in representing the value of the schooner, has represented it greater than he believes it to be, but at the

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Indisposition
of the Court to
interfere with
report of Re-
gis-
trar and
Merchants.

Evidence in
the case.

Prime cost as
stated by
owner on affi-
davit.

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Unsupported
by document-
ary proof.

same time I must say the evidence is wholly unsatisfactory on principles of law. Let us see how the case stands. Here is the affidavit of a party interested in putting the highest value on the property destroyed. He either built the vessel himself, or caused it to be built under his superintendence, of the finest oak and timber of the best description, but he did not bring before the Registrar and Merchants one single atom of documentary proof in corroboration of his statement. I am at loss to consider why he did not do so. I am of opinion they could hardly come to any other conclusion than what they did, in the absence of proof on a point so indispensably necessary to found a legal judgment on the case. It is a different thing to say, I do not credit a person on oath when he makes an affidavit, and to say there is no competent proof of the fact, when he has it in his power to give in documentary evidence, so as to put the question beyond doubt as to the original price. This is the more important, in my opinion, because I think all the evidence produced on the part of the owner has been evidently grounded on the affidavit of the owner as to the cost incurred. They did not form their opinion upon documents submitted to them, showing the price of labour and the materials which go to constitute the expenses of building a ship, but what they state is merely a conjecture on the statement the owner has made to them. Therefore, I must say, that as far as the actual cost of the ship is concerned, the evidence is by no means satisfactory to my mind. I should further observe that, although I have but little practical knowledge on the subject, still I must not divest myself of that *scintilla* which I have acquired in this Court and elsewhere, and I must say the expense of building this vessel, even admitting her to be a first class ship, strikes my mind as most extraordinary. It was, therefore, the more incumbent upon this gentleman to produce this evidence, because, according to him, the vessel was of extraordinary strength and peculiar build. It therefore became him to satisfy the Registrar and Merchants that his evidence was confirmed by the best evidence which the case would afford.

Wear and tear
of ship.

Not classed at
Lloyd's.

With respect to wear and tear, I do not know that it is necessary for me to make any further observation on that matter, for I do not know that that was a matter upon which there was much conflict between the parties. There is another circumstance which does appear to me unfortunate, as far as relates to the evidence in this case, namely, that this vessel was not classed at Lloyd's. If she had been classed at Lloyd's, we should have had another element whereupon to build a conclusion as to her value; but not having been so classed, for some reason that does not appear, and which it is not necessary to investigate, the Court is de-

prived of the advantage which might have been afforded by it if she had. This is the state of the evidence on the one side.

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When I look to the other side, there is the evidence of persons who never had the advantage of seeing the vessel in question; and, therefore, if the matter stood in opposition, the one side to the other, if my judgment was to be grounded upon that, I must give the preference to the evidence of men of experience, who had had an opportunity of seeing the vessel. But that is not the case here, because the witnesses on the part of the owner are all proceeding on the supposition of the original cost of the vessel as stated to them by him. It is impossible to say that these gentlemen, Mr. Westbrook, Mr. Bailey, Mr. William Allen, and others, are not persons competent to form an opinion of what would be the ordinary price in the market of a vessel of this size and description at the time she was lost. I must say I place some value on their evidence for this reason, they do not come from the place where the other witnesses do. The other witnesses come from the neighbourhood where the owner resides, from Faversham, and the Court must be on its guard where evidence comes, as this does, from the immediate neighbourhood where the claim is made. Upon the whole, I am not satisfied that the Registrar and Merchants have come to an erroneous conclusion. I must confirm the report. But in coming to this conclusion, having given great consideration to this case, I do not think I ought to condemn the parties in the costs, for I have entertained a doubt, and have taken some time to deliberate in my own mind before I came to the conclusion at which I have arrived. Each party is to pay his own costs.

Adverse evidence by persons who never saw her,

but are nevertheless competent to form an opinion of her value in the market.

Report confirmed. Each party to pay his own costs.

F. Clarkson, proctor objecting to the report.

Toller in support thereof.



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Jan. 12.

THE CALYPSO, W. REYNOLDS, *Master*.*Damage—Both Vessels in fault—No Cross-action—Subsequent Suit.*

The owners of the ship A. brought an action in a cause of damage against the owners of B. The Court found both to blame, no cross-action had been entered pending those proceedings. Subsequently the owners of B. entered an action in a cause of damage against the owners of A., who gave an appearance under protest. Held, that the owners of A. must give an absolute appearance, though a cross-action in the first instance would have been the proper course. Protest overruled, but without costs.

THIS was an action for damage arising from collision, brought by the owners of the Equivalent against the owners of the late bark Calypso. On 20th December, 1855, F. Clarkson, on behalf of the owners of the Equivalent, returned into Court a monition personally served on the owners of the Calypso in an action of damage entered at 2,200*l*. Ring, for the owners of the Calypso, appeared to this monition, but under protest, on the grounds set forth in an act on petition, namely, that on the 1st February, 1855, he (Ring) had entered an action in the sum of 1,400*l*. on behalf of the Calypso against the Equivalent in a cause of damage; that F. Clarkson appeared for the Equivalent; that the cause was regularly prosecuted; and that on the 29th October, 1855, the Judge, assisted by Trinity Masters, had pronounced that the collision in question was caused by the default of both vessels, and that the damages arising therefrom ought to be borne equally by the owners of both vessels; and Ring alleged that the action now entered by Clarkson was in respect of the damage pretended to have been sustained by the Equivalent in consequence of the said collision with the Calypso, and not in respect of any other or different collision; and Ring, submitting that any action by or on behalf of the owners of the Equivalent against the Calypso in respect of the said collision ought to have been entered before the action on the part of that vessel against the Equivalent in respect thereof had been adjudicated upon, prayed that his parties might be dismissed from this suit, and from all further observance of justice therein.

The *Queen's Advocate* and *Bayford* argued in support of the protest.

Addams and *Twiss*, *contra*.

DR. LUSHINGTON :—The question which arises in this case is as follows : but I would first observe that I intend to decide only the point now before me, and not to express any opinion on questions that may arise afterwards. It appears that Mr. Clarkson, on behalf of the Equivalent, returned a monition personally served on the owners of the Calypso in a cause of damage ; and the question which I have to determine is, whether the defence set up in this act on petition is sufficient to induce me to decide that the monition ought not to be enforced against these parties ? Mr. Ring's statement on behalf of the owners of the Calypso is, that there has been a previous action in which they were Plaintiffs against the Equivalent, the owners of which are prosecuting the suit through the medium of this monition. He says this was a question of collision ; and that the Court, with the assistance of Trinity Masters, came to the conclusion that both parties were to blame. It is not denied that such is the state of facts ; but the question for me now to determine is, whether, in this stage of the case, I consider that sufficient to sustain the protest entered into ? The usual practice is, that when one vessel has been proceeded against in a cause of collision, and the owners of the other think they have any chance of obtaining a decree in their favour, to enter a cross action, and it is generally agreed between the practitioners that the decision in the one case shall govern the decision in the other. I am not aware that it is in the power of the Court, if the proctors were not consenting to such agreement, to say that both actions should be governed by the one, as a matter of right. Fortunately, I am glad to observe that the usual, indeed the uniform, practice is, that the decision in the one action shall govern the other. Undoubtedly it is advantageous, because it tends to save an expense which would attend a second investigation of the question. Upon the present occasion, the owners of the Equivalent being the party originally proceeded against by the Calypso, contented themselves with denying that those on board their vessel had been guilty of any neglect, or of misconducting themselves so as to render them liable to the action brought against them. * Now, upon what principle is it that I am to exclude the owners of the Equivalent from bringing an action in a cause of damage, when I have no right to presume what course they will follow or what facts they will allege ? I am clearly of opinion I can do no such thing. If one party thinks fit to lie by and see the result of another action, I have no means of compelling that party to say, "I am Defendant ; I also will become Plaintiff." The Court regrets that the hearing of these cases should be protracted ; but at the same time it cannot act from any

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Judgment.

Usual practice is to enter a cross-action, and for the proctors to agree that decision in one case shall govern the other.

This course not followed in the present case.

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But the party
is not thereby
estopped.

Court will not
however en-
courage such
proceedings,
and will not
give costs.

feeling of that kind, and do that which it is now called upon to do, and say that an action having been brought by A. B. against C. D., C. D., in consequence of anything that occurred in that trial, shall be estopped from bringing an action against A. B. I decide nothing but that the party is not estopped. The Court does not decide what shall be the effect of the decision in the previous case; it does not decide what may be pleaded in bar. That is not the question. It appears to me that this question has been raised prematurely; and it seems to have been thought that the Court would consider the case, as if a libel had been given in, and facts and circumstances had been pleaded in bar. I am not considering what is a plea in bar, but whether this is a good protest. I am of opinion that I must overrule the protest. I shall not give costs. I never will encourage this course, namely, the party defendant in a case waiting the effect of an investigation, lying by, and then bringing another action. Not only will I not encourage it, but I will in every stage, as far as it is in my power, through the medium of costs, greatly discourage it. On the present occasion I must overrule the protest, but without costs; a cross-action ought to have been entered originally.

F. Clarkson, proctor for the Equivalent.

Ring for the Calypso.

H. M. S. SWALLOW. J. N. KING, *Commander*.

Collision—Practice—Costs against Queen's Ship.

The Court of Admiralty cannot take any notice of what took place at a Court of Inquiry in deciding who is the party to blame in case of collision. Costs will be given against a Queen's ship when pronounced in fault.

Jan. 24.

THIS was an action brought by the brig *Leila* against Mr. King, the officer in command of her Majesty's ship *Swallow*, to obtain compensation for the loss arising from a collision between these two vessels, at 12:30 A.M. on the 25th June, 1854, off the Isle of Wight. An appearance was given for Mr. King by direction of the Lords of the Admiralty. The *Leila*, coal-laden, was bound to Cadiz; the *Swallow* was proceeding from Milford to Portsmouth, for the purpose of taking in her engines. The *Leila*, it appeared, was close-hauled on the star-board tack; the *Swallow* was running right before the wind. The night was foggy, and on the *Leila* descrying the *Swallow*,

from her starboard bow, making directly for her, she exhibited a lantern, and a fog-horn was loudly blown. The light was answered by the Swallow, and her helm slightly ported. The Leila kept close to the wind until the last moment, when in order to ease the blow, her helm was put hard a-port, and her head sheets let fly. The Swallow in her defence alleged that on descrying the Leila she put her helm hard a-port; that the fog was so thick that the two vessels could not see each other in time to avoid the collision, which was the result of inevitable accident.

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The Court was assisted by Captains *Weller* and *Pigott*.

Jenner and *Deane* were heard for the Leila.

The *Queen's Advocate* and the *Admiralty Advocate* for the Swallow.

DR. LUSHINGTON, addressing the Elder Brethren, said: Gentle- Judgment.
men:—In one respect I entirely concur in the observation of her Majesty's Advocate, that this case has been very unfortunately conducted on the part of those proceeding, for I consider it to be utterly useless, and not only useless, but injurious, to introduce into an act on petition statements of what took place in a court of inquiry, which never by rational conception could be made evidence, and which statements in themselves are now completely disproved. I also agree that no satisfactory reason has been assigned for the delay in bringing this action. The observation, that there is an absence of witnesses whose evidence the Court is entitled to require, is also entitled to weight. But the true question after all is this,—looking at the evidence which has been produced, and at the evidence offered on the other side, what is the just and right conclusion to which you should come? If you are of opinion that the parties bringing this action, looking at the evidence on both sides, have not established their case, then you must pronounce against them; for undoubtedly the burden of proof is on the Leila, to show that this damage was done by some neglect or default on the part of the Swallow. Now, gentlemen, having made these observations, let us look at the facts of the case, and see not only what is sworn on behalf of the Leila, but what is admitted by all the evidence on the part of the Swallow, and then see to what deduction these premises will bring us, [The learned Judge then went through the evidence in the case, and still addressing the Elder Brethren, said]:—I have now stated all which I think it necessary to do, though I could state a great deal more. The question I put to you is, whether you do not think the Swallow to blame?

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Captain *Weller* : We consider the *Swallow* to blame entirely.

Captain *Pigott* : Entirely.

The Registrar : Does the Court give costs, this being a government case ?

The COURT : I am glad you have mentioned that. I shall do so, because that question arose at the Privy Council a few years ago, where the proceedings were against the Lords of the Admiralty, and they decreed the costs of the appeal (*a*).

Jenner, proctor for the *Leila*.

Proctor of the Admiralty for the *Swallow*.

H. M. S. INFLEXIBLE, W. R. MUDGE, *Commander*.

Collision—Ship close hauled on Starboard Tack—Steamer—Regulation of Merchant Shipping Act—Virâ Voce Evidence—Preliminary Act.

The 296th sect. of Merchant Shipping Act directs all vessels to port their helms when a continuance on their courses would involve any risk of collision, subject to keeping sailing vessels close-hauled on starboard tack under command. The section applies to ships meeting, not crossing each other's courses; and the risk of collision, which is the condition of the obligation to port the helm, is a proper question for the determination of the Trinity Masters. A steamer going about five knots on a dark night held to be in fault for not porting her helm on seeing a light two points on her port bow.

Jan. 28.

THIS was a suit promoted by the Soubahdar, of the burthen of 762 tons, against Mr. W. R. Mudge, the commander of her Majesty's steam ship *Inflexible*, to recover the loss arising from a collision between them off Beachy Head at 10 p.m. on the 9th of November last. The Soubahdar was bound from Calcutta for London with a cargo of general merchandize; the *Inflexible* was proceeding from Woolwich to Portsmouth, having on deck about 160 tons weight of steam machinery. According to the plea of the Soubahdar, she was close-hauled on the starboard tack, heading from E. to E. by S., with a bright signal lantern hung out on her flying jibboom. She descried the *Inflexible* a point on her starboard bow, distant about a mile, upon which two flambeaux were shown in succession, notwithstanding

(a) See *The Queen v. Belcher*; *The Illeanon Pirates*, 6 Moore, P. C. 484.

standing which the Inflexible continued to approach her without any alteration of her helm, until it was too late, when she ported, thereby crossing her hawse and rendering a collision inevitable. Up to that period the Soubahdar had been kept close to the wind, but she then ported her helm in order as much as possible to ease the blow. The Inflexible ran into her, and carried away her bowsprit, jibboom figure-head, and cutwater, and afterwards, with her paddle-box, knocked in the starboard bow. On the part of the Inflexible it was alleged, that at the time in question she was steering W. by S. by the standard compass; that the wind was moderate from S.W. by W., and the weather thick, with drizzling rain. The officer in command saw a light, which had just been reported, about two points on the port bow, but, owing to the thickness of the weather, was unable to discern the vessel from which it proceeded. The light then disappeared, but in about two minutes it again showed bright a little before the port paddle-box, when he immediately called out "Port hard!" and ordered the engineer to stand by the engines. These orders were instantly obeyed, and three or four minutes afterwards, seeing a collision to be inevitable, he ordered the engines to be stopped. The steamer had fallen off from W. by S. to W.N.W., but the Soubahdar ran stem on into the port paddle-box of the Inflexible, crushing her wheels and carrying away her bowsprit. She attributed the accident to the neglect, default, or mismanagement of those on board the Soubahdar. The libel was given in by the Soubahdar on the 14th inst., the responsive allegation on the part of the Inflexible on the 22nd, and on Friday last, the 25th, the witnesses, twenty-one in number, were examined *viva voce*.

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The Court was assisted by Captains *Redman* and *Drew*.

Addams and *Twiss* for the Soubahdar.

The *Admiralty Advocate* for the Inflexible.

DR. LUSHINGTON, addressing the Elder Brethren, said:— Judgment.
Gentlemen, before you retire for the purpose of considering this case, and thus making up your minds as to the advice which you will give to the Court, I think it necessary to offer a few observations. There is, upon the present occasion, a proceeding which has only recently been introduced into the practice of the Court, and which appears to me of very great importance; I mean, requiring the parties to give in, sealed up, so that no one sees it, the preliminary act, setting forth the particulars, from Preliminary Act.

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Case of the
Inflexible.Steps taken to
avoid collision.Case of the
Soubahdar.Questions to be
decided.

which they cannot depart (a). On behalf of the *Inflexible* it is stated that the *Soubahdar* was first seen broad on her port port bow, distant from about a mile to a mile and a half (b). This is an admitted fact in the case, on which we must proceed. It is important to tell you that I shall never allow any evidence to be used to contradict a fact so stated—that is, from the parties themselves who make the averment deliberately. The next point, as it appears to me, is of equal importance—the steps taken to avoid a collision. The helm was put hard to port, and the engineer ordered to stand by the engines. In two or three minutes afterwards the engines were stopped. The point, however, in dispute—and it is the only important fact which is in dispute—is the quarter from which the wind blew. I will presently call your attention to the state of the evidence on this subject. That is really and truly the only question put in issue by the statements of each party on both sides in the first instance. According to the statement of those on board the *Inflexible* the wind was S.W. and by S., and I presume—but I must particularly call your attention to this—that in the statement on behalf of the *Inflexible* they are always speaking of the standard compass; but you, gentlemen, will know what the variation is, and what the direction of the wind would be by the ordinary compass. They state that the wind was S.W. and by S., and that they were steering W. by S. by the standard compass. They were proceeding from Woolwich to Portsmouth, heavily laden with machinery. On behalf of the *Soubahdar*, it is said that the wind was from S. to S.S.E., and that her course was from E. to E. and by S.,—they are speaking from the ordinary compass which is in use on board merchant vessels,—and they give a mile as the distance at which the *Inflexible* was first seen. They allege that they were close-hauled on the starboard tack, carrying a light; that they showed two others, and kept close to the wind till a collision was inevitable, and then ported their helm. This is very important with reference to an argument adduced by the Advocate of the Admiralty on behalf of the *Inflexible*. Independently of the questions which have been suggested by Dr. Phillimore, there are three that concurred to me:—First, whether you were of opinion that the *Soubahdar* starboarded her helm at all; secondly, whether you are of opinion that, though she ported, she ported too late; and with regard to the conduct of the *Inflexible*, it appeared to me, in point of fact, that there was but one question—whether

(a) See Rules and Regulations of the High Court of Admiralty, confirmed by Order in Council, 7th Dec. 1855, Appendix, No. 3.

(b) So stated in the preliminary

act brought in by the *Inflexible*; in her allegation the *Soubahdar's* light was stated to have been reported about two points on the *Inflexible's* port bow.

she did not neglect to port until it was too late. These are the questions, and I believe they comprise all that was stated by Dr. Addams. The questions suggested by Dr. Phillimore I need not read over. Into this case, as into all others of a similar description, the Act of Parliament is introduced. The true construction of that Act of Parliament in one sense it is for the Court to determine, because, being a question of law, that burden rests on my shoulders, not on yours. But it is not simply a question of law, but a question whether circumstances occurred which ought to induce the Court to say that the section of the Act either does or does not apply. The Act, to which I refer, is the Merchant Shipping Act, 1854, sect. 296, it is in these words:—
 “Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship”—you must allow me to be a little prolix on the matter, not that you will not understand it, but I wish other people present, and others out of doors, to understand it—this is made expressly to embrace every ship, whether going by steam, or whether a sailing vessel; and it also applies to one ship proceeding in one direction and meeting another—I pray you to bear that in mind, that it does not apply to vessels crossing each other—“whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision.” That is the condition of the obligation to port the helm, viz. whether they will pass so near as to involve any risk of collision; and it is a point for you, not for me, because you must determine whether both ships were proceeding so that if they continued their respective courses they would pass so near as to involve any risk of collision; for, if they were not so proceeding, then there was no command on one vessel or on the other to port her helm. We must look to that, with reference to all the facts. If a sailing vessel meets a steamer, the one going up, the other down channel, the sailing vessel may descry the steamer, and at a very great distance, and it may be that if the steamer is directly ahead, she may see all the three lights three miles off; but it does not follow that the moment a sailing vessel sees a steamer at three miles’ distance she is to begin to alter her helm: that may be a dangerous thing supposing she was close-hauled; but they must be so meeting each other that there will be danger of a collision, and in that case they ought to port the helm, and port it in time. “And this rule shall be obeyed by all steam ships, and by all sailing ships, whether on the port or starboard tack;”—therefore, in one sense, it applies to the *Soubahdar*, although she was on the starboard tack;—“And whether close-hauled or not, unless the cir

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Merchant
Shipping Act,
1854, Sect. 296,

applies to ships
meeting not
crossing.

Obligation to
port the helm
arises only
where there is
risk of collision.

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Rule as to
vessel close-
hailed on star-
board tack be-
fore the statute,

under the
statute.

Do the facts
bring the case
under the rule
of the statute?

Evidence of
master of the
Soubahdar.

Evidence of
officer in
charge of the
Inflexible.

cumstances of the case are such as to render a departure from the rule necessary, in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack, close-hauled, to the keeping such ships under command." Before the passing of this statute it was a sort of established doctrine, that a vessel being close-hauled on the starboard tack was to keep her course, and never to put her helm to port at all. Now, the statute says, that you shall port your helm—you shall not be excused on account of being on the starboard tack; but it does not say that you shall throw yourself into stays—that you are to lose command of your vessel. Now, the question is as to the applicability of the statute to the facts and circumstances of the case. As to the facts, of course we must take them from the evidence. You will observe it is an undenied fact here, in the very statement made on behalf of the Soubahdar, that she kept close to the wind until a collision was inevitable, and then she ported her helm. Now let us see how they saw each other. And I will take the evidence of Captain Umphreville, master of the Soubahdar. After having given the state of the wind and the weather, he says he saw the masthead light; he then saw the red light, and in about a minute he ordered the helm to be put hard aport to ease the blow, otherwise she would have been struck amidships. He says the steamer had altered her course—her helm must have been shifted and put to port. This he saw a minute or a minute and a half before the collision. He gave orders to port when he saw that she had altered her helm;—the Soubahdar answered her port helm; the sails were lifting. Now, I understand from this evidence that the Inflexible was seen about a mile off, and a point or two on the starboard bow of the Soubahdar, coming down channel. If you think, being seen at the distance of a mile, that it was the duty of those on board the Soubahdar immediately to have ported their helm without more ado, and if you think—I will not say according to the terms of the Act of Parliament, because I do not mean to place upon you the onus of construing it—but if you think that, the Soubahdar being close-hauled, there was at that time danger involving a risk of collision, and therefore it was incumbent on the Soubahdar to port, undoubtedly she did not port then, for she ported later. Having stated this question, I will come to the conduct of the Inflexible, and I will give the statement of Mr. Bindon, who was the officer in command at the time. He was on the watch on the foremost bridge. The weather, he says, was hazy, inclined to fog, with drizzling rain. Then he says the wind was S.W.

by W. to S.W. by S., a lighter breeze than they can carry whole sail with, a moderate breeze; the course was W. by S. Then he says he saw the lights of the Soubahdar two or three minutes before ten; he saw her on the port bow, fully two points; the light remained bright at first, it dwindled, and went out. He saw another light afterwards three or four minutes after ten; that would make it seven or eight minutes. The second time it was very bright before the port paddle-box. He says he ordered the helm to be put hard aport. The steamer was going five knots. From "hard aport" to the collision occupied about three minutes and a half to four minutes. He then stopped the engines. The question for you to determine is this, whether or not the Inflexible, being a steamer, and seeing the vessel in the way he describes—seeing her so long before the collision, and having ample time to port the helm,—was not guilty of culpable delay in porting it—remembering that a steamer is much more easy to handle than a sailing vessel. I do not rely on the hasty words extracted from him, that steamers were not to port their helm to every vessel they saw.

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The learned Judge and the Elder Brethren having retired for consultation; on their return,

DR. LUSHINGTON said:—Now, I will first read the questions which Dr. Phillimore suggested. Assuming that the Soubahdar saw the steamer one point on her starboard bow, must she not have seen the green light, and not the red, a mile distant?—No. Secondly, if she saw the red light, as she says she did, must she not have starboarded?—No. The next question was, whether the evidence given by Mr. Brown as to the damage done to the vessels did not prove that the Soubahdar starboarded her helm?—No. Then the questions which I put myself were these:—Whether the Trinity Masters were of opinion that the helm of the Soubahdar was starboarded?—They are of opinion that it was not. Whether they are of opinion that she ported too late?—They are of opinion that she did not port too late. The last question I put was as to the Inflexible, whether she did not neglect to port in time?—Yes. I pronounce, therefore, against the Inflexible, and give the costs.

Questions put
to, and answers
of, the Trinity
Masters.

F. Clarkson, proctor for the Soubahdar.

The Proctor for the Admiralty for the Inflexible.



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THE ERICSSON, LOWBER, *Master.*

*Collision—Insufficient look-out on Steamer going at rapid Rate
—Construction of 296th Section of Merchant Shipping Act.*

A vessel on port tack, with wind free, at night, saw the green light of a steamer, broad on her starboard bow, showed a light, but did not alter her course till the steamer was close upon her, when she starboarded to ease the then inevitable collision. Held, that neither common sense nor the Merchant Shipping Act required her to port her helm, for there could be no danger while the green light was broad on her starboard bow. A steamer going ten knots on a clear dark night, held to blame on her own statement, for if there had been a proper look-out she must have seen the other vessel in time.

IN this case the barque Alderman Thompson proceeded against the Ericsson, an American paddle steamship, running between Bremen and New York, and calling on her way at Southampton, for damage arising from a collision which took place off Dover, about midnight, on 15th October, 1855. The barque was proceeding in ballast from Portsmouth to Sunderland, the steamer was proceeding from Bremen. On behalf of the barque it was stated to be a clear night, though not moonlight, but stars bright; that she was under easy sail on the port tack, heading E.N.E., wind N.W. by N., going at the rate of about two and a half knots an hour; the South Foreland about three miles broad on larboard bow; the watch on the barque saw the bright and green lights of the steamer broad on their starboard bow not less than four miles off: they showed a light in a lanthorn over their starboard bow, and did not alter their course till the steamer, which took no notice of them, was close upon them, when they put their helm to starboard to ease the collision which was then inevitable; the steamer caught the barque's starboard quarter, carried away her mizen-mast and the whole of the stern frame with the wheel and the seaman at it, who was drowned. On behalf of the steamer it was stated that, though there was a good look-out on deck, they did not see the light of the barque till she was close under their port bow; that orders were then given to port the helm and to slow, stop and reverse the engines; that the engines were working astern, but they could not say that the steamer's way was stopped at the time of collision; she denied that the barque showed a light till she was close under the steamer's bow, and said that if the barque had ported her helm, even at the last, the collision might have been avoided. She admitted that the night was clear, but dark.

The Court was assisted by Captains *Farquharson* and *Were*.

DR. LUSHINGTON, without hearing Addams and Twiss, who appeared for the barque, called on Haggard and Robinson for the steamer, and then said :—The Trinity Masters and myself are quite clear about this case; even on the statement and evidence of the Ericsson herself, she was going nearly ten knots an hour, and it is impossible not to come to the conclusion that if there had been a proper look-out she would have seen the barque at quite sufficient distance to have avoided the collision. We think the barque was right in not porting her helm whilst she saw the green light of the steamer. She did not see the red light till the steamer ported her helm, and it was then too late for the barque to have ported, and she was justified in starboarding to ease the blow. Assuming that the American vessel was within three miles of the coast, and so subject to British statute law—for I will decide nothing on either of these points till they are formally before me—I do not think the provisions of the 296th section of the Merchant Shipping Act apply to the other circumstances of the case. It has been argued that the barque, on the port tack with the wind free, ought to have ported her helm when she saw the green light of the steamer approaching on her starboard side. If she had ported her helm, the effect would have been to throw herself across the course of the steamer. But the statute orders no such thing; the words are, “Whenever any ship proceeding in one direction meets another ship proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of collision, the helms of both ships shall be put to port so as to pass on the port side of each other.” But as long as the green light is seen broad on the starboard bow there is no danger of collision. It never was intended that when a vessel sees another at the distance of two miles, that she is to begin to change her course because there is a possibility of a collision. The intention of the statute is, that when two vessels are approaching each other and are within such a distance that there is strong probability of collision if both keep their courses, in that case both vessels are to port.

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Judgment.

No sufficient look out on board the steamer.

Barque justified in not porting while she saw the green light broad on her starboard bow.

Risk of collision, not merely a possibility of collision, is the condition imposed by the statute.

As to the light shown by the barque, it seems to have been of the usual description and shown in the proper position. No interrogatories have been put to the crew of the barque on this point, which ought to have been done if there was doubt about it.

I think it also my duty, considering the respective sizes of the two vessels—the Ericsson, a steamer of near 2,000 tons, the barque

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not quite 300—to animadvert on the conduct of the *Ericsson* after the collision, in not taking proper measures to afford assistance to the barque, which she had every reason to suppose must have been seriously damaged. This being an American vessel, the persons on board of her are not within British jurisdiction. In the case of a British steamer so misconducting herself I should have thought it my duty to recommend the Board of Trade to institute a criminal prosecution.

Rothery, proctor for the barque.

Toller, for the steamer.

THE LEDA, CUTHBERT, *Master*.

Salvage—Action in 200l.—Appearance under Protest under Sect. 460 of the Merchant Shipping Act.

An action for salvage rendered without the limits of the Cinque Ports, but within three miles of the United Kingdom, was entered in the sum of 200l. Appearance was given under protest, under the 460th section of the Merchant Shipping Act. Held, that this section, and the 458th, must be taken together, and that where any salvage service is performed within three miles of the coast of the United Kingdom, the limitation of jurisdiction, by reason of the amount claimed, attaches: that “stranded, or otherwise in distress on the shore,” are distinct situations; that the latter does not mean only touching the shore; but that the legislature does not intend the limitation of jurisdiction arising from the amount claimed to attach to any salvage service performed on the high sea, *i.e.*, more than three miles from the shore. Protest sustained.

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ON the 28th of October last, during a heavy gale, the schooner *Leda* was observed from Blakeney Town running towards the land under reefed sails, with a flag flying half-mast high in her topmast rigging. The life-boat *Sailors' Friend* was manned with eighteen hands, and proceeded down the harbour towards the bar. The schooner was then distant about a mile from the land, but when the life boat reached the bar, a mile and a half from the town, she was about a quarter of a mile from them. After boarding her, they brought her round the point into Blakeney Pit, and there moored her in safety. They entered an action against her in the sum of 200l. to obtain compensation for their services. The owners of the schooner appeared under protest, and alleged that in and by the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 460, it was expressly provided that the

dispute respecting any salvage wherein the sum claimed by the salvors did not exceed 200*l.* should be referred to the arbitration of two justices resident at or near the place where the ship saved was lying, or resident near the port into which she was brought after the occurrence of the accident by reason whereof the claim arose; and that unless the sum claimed exceeded 200*l.* the Court of Admiralty had no jurisdiction. In answer to the act on protest it was submitted, on behalf of the salvors, that the section applied only to the case of any ship or boat which might be stranded or otherwise in distress on the shore of any sea or tidal water within the limits of the United Kingdom, and that that was not the case with the schooner. It was further stated that there were no justices of the peace resident in Blakeney, or within six miles thereof, and that, although the salvors endeavoured to prevail on the master of the schooner to allow the question to be settled by some merchants or shipowners at Blakeney, he positively refused so to do, or to make them any compensation for their services. In reply, the owners stated that there were two magistrates resident near Holt, within five miles of Blakeney.

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Addams and *Twiss* appeared in support of the protest.

Jenner against it.

DR. LUSHINGTON:—In this case an action in the sum of Judgment. 200*l.* was entered in a cause of salvage, to which an appearance was given under protest, and the question for the determination of the Court is, whether it has jurisdiction to entertain the present suit, the demand being for so small a sum as 200*l.* The service alleged to have been performed is stated in the act on petition to the following effect:—That the *Leda* was observed from Blakeney Town running towards the land with a flag of distress; that the life-boat was manned and proceeded down the harbour towards the bar; that the *Leda* was about one mile from the land; that when the salvors reached the bar, about one mile and a half from the town, she was a quarter of a mile from them, and a little within the stream of the sea buoy; that the salvors boarded her and brought her in in safety. The owners deny the jurisdiction of the Court, and in support of their objection refer to the 460th section of the Merchant Shipping Act. It is admitted on all hands that the Court originally had jurisdiction over such cases, and the only question is whether such jurisdiction has been taken away by the statute referred to. The 460th section enacts—first, that disputes with respect to salvage arising

Facts of the case.

Is the jurisdiction of the Court ousted by the statute?

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Salvage in the
United King-
dom,

within the boundaries of the Cinque Ports shall be determined in the same manner in which they have hitherto been determined. Before I proceed further, it will be prudent to consider the meaning of this enactment. And here arise two questions:—First, what is salvage within the intent and meaning of this Act? And, secondly, what is meant by salvage arising within the boundaries of the Cinque Ports? It will not, however, be necessary for me to prosecute that inquiry or to decide that point on the present occasion. These considerations bring me to the preceding part of the statute. Just previous to the 458th section I find the following words:—"Salvage in the United Kingdom." This statute, therefore, does not relate to all salvage, but only to salvage limited by the words "in the United Kingdom." Then, what is the meaning of this limitation? Is it salvage services within the limits of the United Kingdom, or salvage rendered anywhere, but the suits brought into court within the limits of the United Kingdom? Let me consider the consequences of both these constructions. If I adopt the first construction—which appears to me to be the more natural—then immediately arises another question, what are the limits of the United Kingdom, according to the intention and true construction of the statute? Now, the only answer I can conceive to that question is—unfortunately it is one which must be answered somehow or other—the land of the United Kingdom and three miles from the shore. Such, I apprehend, to be the utmost extent to which I can go; for, neither in law nor in common parlance is the high sea at a greater distance from shore than three miles called the United Kingdom. If this be so, then, according to this construction, any salvage service performed on the high sea at a greater distance than three miles from shore would not come within the operation of this part of the statute. The effect of this construction on the 460th section I will presently advert to. Then let me suppose that the true construction is, that it includes all cases of salvage—I am taking now the alternative construction—wheresoever rendered, brought *quocunque modo* into the United Kingdom for adjudication. This I think would be a very strained construction to put on the words of the statute, and, if adopted, would be inapplicable, or at least very difficult to be applied, to the subsequent sections of this Act. It could scarcely be contended that salvage services performed in the East Indies, the Mediterranean, or the Bay of Biscay, could be comprehended under the terms "Salvage in the United Kingdom," or that the regulations which might be convenient for deciding as to the service close at home

could be made effectual for services performed at a distance. I think, therefore, that, looking at these words, even confining myself to the true construction of the words already used, "Salvage in the United Kingdom," I must hold that the act contemplated only those services which were performed within the limits of the United Kingdom, namely, within three miles of the shore. This would be my opinion, independently of what follows in the 458th section. Now let me see how far the definition contained in that section corresponds with the construction which I have put on the isolated words—the words I have already mentioned. I apprehend that the true and only construction to be put on the words of the 458th section entirely corresponds with that construction which, even without them, I should put on the words "Salvage in the United Kingdom." Now the 458th section is in these words, "Whenever any ship or boat is stranded or otherwise in distress, on the shore of any sea or tidal water situate within the limits of the United Kingdom; and services are rendered by any person, first, in assisting such ship or boat; secondly, in saving the lives of the persons belonging to such ship or boat; thirdly, in saving the cargo or apparel of such ship or boat, or any portion thereof; and whenever any wreck is saved by any person other than a Receiver within the United Kingdom." It appears to me that the words of limitation in this section are precise and definite that the services to be rendered, and to which the statute applies, must be rendered on the shore of any sea or tidal water situated within the limits of the United Kingdom, and that, consequently,—I must repeat the words I used before,—I go to the utmost length to which I can by any legal construction go, when I say that the statute applies to services rendered within three miles of the shore. The 459th section is limited in its operation to what is described in the 458th. The 460th section, the construction of which is the most important to the decision of this case, refers, in terms which I think admit of no dispute, to the 458th section. The terms used are, "The owners of any *such* ship, boat, &c.," namely, the owners of any ship or boat which may be placed in circumstances specified in the 458th section. I think, then, that the true construction of the 460th section is the same as that of the 458th section; that it is confined to services of a salvage nature rendered on the shore of any sea or tidal water within the limits of the United Kingdom. In all such cases, if the claim does not exceed 200*l.*, it is to be referred to two justices of the peace. In the present instance the services were rendered within three miles of the shore, though not exactly on the very

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means salvage
performed
within three
miles of the
shore.

and agrees
with sect. 458.

Sect. 460.

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In distress on
the shore of
any sea,

means in dis-
tress within
three miles
of the shore.

shore itself. Then the case resolves itself into this narrow point—what did the legislature mean by the words—“otherwise in distress on the shore of any sea.” Whether the words, which follow in the Act of Parliament, viz.,—“situate within the limits of the United Kingdom,” are to be added or not, may be a question. It is clear that the legislature did not mean stranded only, for that expression precedes it. “On the shore” is, as I admit, a very ambiguous term. I do not think that being “in distress on the shore” means that the property, ship or goods should be exactly on the shore itself, and I think so for several reasons:—First, because if such were the true meaning, it would be difficult to distinguish such case from stranding, and the statute evidently contemplates a case of distress distinguished from stranding. Secondly, because, independently of other expressions which in some degree tend to the same conclusion, the 458th section refers to wreck; and the definition of wreck in the statute, and the nature of wreck so described, shows that it cannot be confined to what has touched the land. For these reasons I have come to the conclusion that the words “in distress on the shore of any sea,” in the 458th section, refer to vessels in distress in the vicinity of the shore, provided it be within the limits of the United Kingdom, and that it is not confined to what touches the shore itself. Then, if I am to hold that this is the true construction, I can give no other definition to the words than that I have already done. I feel it utterly impossible to fix the distance by any rule whatever; I must, therefore, resort to some legal principle, and the only effect I can give to the words is that which I have already stated. If the legislature really contemplated more, then I must say the words used in the statute do not give effect to their intention, and the maxim *quod voluit non fecit* would apply to the present case. But I entertain much doubt whether the legislature did intend to go beyond the conclusion I have put upon the statute. I doubt if any intention was entertained of excluding from the Admiralty jurisdiction salvage services, even of small amount, performed on the high seas, and at a distance from the United Kingdom; and I entertain this doubt for several reasons: First, because if such were the intention, nothing would have been more easy than to have expressed it in a few words; all that would have been necessary would have been to have said—no salvage suit shall be brought in the High Court of Admiralty when the sum sued for does not exceed 200*l.*; but no such words are used. Secondly, when services are performed on the high seas, and ships and cargoes are carried to different, and sometimes distant ports, and to

which neither salvors nor owners belong, and where *vivá voce* evidence could not easily be given, a jurisdiction by two justices seems to be wholly inapplicable. For these reasons then, I am of opinion that I must adhere to the construction I have stated. The consequence will be, that on the present occasion I must pronounce for the protest against my jurisdiction. It will be understood that in future cases I shall put this construction on the statute, unless otherwise directed by superior authority.

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Jenner, proctor for the salvors.

F. Clarkson, for the Leda.

In the Privy Council.

Present—The Right Hon. STEPHEN LUSHINGTON.
The Right Hon. T. PEMBERTON LEIGH.
The Right Hon. Sir EDWARD RYAN.
The Right Hon. Sir WILLIAM H. MAULE.

THE LEVIN LANK, J. TUZO, *Master*.

On Appeal from the Vice-Admiralty Court of St. Helena.

On a decree of the Privy Council, reversing a sentence of the Vice-Admiralty Court of St. Helena, which had condemned the Levin Lank as a slaver, and restoring the property with costs and damages, the owners' claim for damages amounting to upwards of 20,000*l.*, was in great part made up of probable or possible profits which it was asserted they might have made, had not it been for the detention of the vessel. Held, affirming the report of the Registrar and Merchants, that the owners were entitled to be reimbursed to the full extent of their losses, but could not claim profits, which though possible, might never have been realized.

THIS was an objection taken to the report of the Registrar and Merchants in a cause of appeal from a sentence of the Vice-Admiralty Court of St. Helena, condemning the Levin Lank, which had been seized by H. M. S. Ranger on the African coast, in January, 1850, on the ground that she was engaged in carrying on the slave trade.

Feb. 8.

In November, 1852, their Lordships advised her Majesty that the sentence appealed from should be reversed, and the ship and goods restored with costs and damages. In April, 1855, the Appellants brought in their claim for damages amounting to

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20,408*l.* 0*s.* 5*d.* Of this claim the Registrar and Merchants allowed only 1,593*l.* 9*s.* 10*d.*; and this report was now objected on behalf of the Appellants.

The Schedule annexed to the report, and the following statement of the Registrar's reasons for such report, contain all the necessary facts and circumstances of the case.

Schedule referred to in the Report of the Registrar and Merchants.

	Claimed.			Allowed.		
	£	s.	d.	£	s.	d.
No. 1. To cost price of the "Levin Lank".....	1,400	0	0	1,400	0	0
2. " Value of cargo on board when seized	23	15	0	23	15	0
3. " Ditto stores ditto	13	4	0	13	4	0
4. " Ditto provisions ditto	11	3	4	11	3	4
5. " Loss sustained by owners of "Levin Lank" up to 4th March, 1850, by being deprived of her services to communicate with the Bonny and New Calabar	1,000	0	0	..		
6. " Value of oil paid to ransom boat and oil seized by the natives.....	45	12	7	..		
7. " Loss on palm oil which could not be shipped in the "Roe" so soon as it would have been by the "Levin Lank"	304	4	0	..		
8. " Wages of 6 Kroomen from 4th January to 1st March, 1850.....	13	10	0	13	10	0
9. " Ditto of Joseph Wallman from 1st January to 21st March, 1850	5	15	6	5	15	6
10. " Ditto of Charles Clements from 4th January to 15th April, 1850	15	3	0	15	3	0
11. " Ditto of Captain Joseph Tuzo from 4th January to 20th August, 1850	90	8	0	90	8	0
12. " Board of ditto from 15th April to 20th August, 1850	19	1	0	19	1	0
13. " Extra detention of the "Mary" by reason of the capture of the "Levin Lank" 21 days at 10 <i>l.</i> per day	210	0	0	..		
14. " Loss sustained on cargo brought to England in the "Mary" by reason of its not arriving so soon as it would have done had the "Levin Lank" not been captured	491	12	9	..		
15. " Extra detention of the barque "Roe" for 74 days at 6 <i>l.</i> per day	444	0	0	..		
16. " Loss sustained on cargo brought to England in the "Roe"	600	15	3	..		
17. " Extra detention of the barque "Druid" 120 days at 8 <i>l.</i> per day	960	0	0	..		
18. " Loss sustained on cargo brought to England in the "Druid"	294	10	8	..		
19. " Passage of Mr. Henry in the "Druid" to give evidence in England 40 <i>l.</i>	60	0	0	..		
20. " Ditto of Charles Clements, ditto 20 <i>l.</i>		
21. " Expenses incurred by Mr. Harrison from Liverpool to London and back in consultation	5	15	0	..		
22. " Wages of Captain Tuzo from 11th January to 31st August, 1852, while in England to give evidence	236	0	0	..		
23. " Ditto of Charles Clements from 11th January, 1851, to ditto ditto	89	11	0	..		
Carried over....	6,334	1	1	1,591	19	10

Schedule—continued.

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	Claimed.			Allowed.		
	£	s.	d.	£	s.	d.
Brought forward.....	6,334	1	1	1,591	19	10
No. 24. To travelling and hotel expenses of Mr. R. C. Henry, Captain Tuzo, and Charles Clements from Liverpool to London, while at the latter place, and back to Liverpool	36	12	0	..		
25. „ Mr. Henry's loss of time from his recovery from illness on 3rd June, 1851, to 31st August, 1852	551	5	10	..		
26. „ Losses sustained by the owners of the "Levin Lank" in their trade at Benin from the 29th January, 1851, when they were officially informed of her condemnation, until the arrival of the tender "Visitor" at Benin on the 31st October, 1852	9,233	18	6	..		
27. „ Ditto by extra detention of their vessels and cargoes up to 31st October, 1852, in addition to that charged as above ..	2,000	0	0	..		
28. „ Ditto sustained by Messrs. Harrison and Company's agents, not being able to keep up a communication with Bonny and New Calabar subsequently to the 4th March, 1850	2,000	0	0	..		
29. „ Amount of postages and other petty disbursements incurred by Messrs. Harrison	1	10	0	1	10	0
30. „ Loss of interest on the amount for which the "Mary's" cargo would have sold, viz., 5 per cent. per annum on 14,837 <i>l.</i> 17 <i>s.</i> 5 <i>d.</i> for 21 days.....	42	13	8	..		
31. „ Ditto ditto "Roe's" cargo, ditto ditto on 6,800 <i>l.</i> for 74 days.....	68	18	8	..		
32. „ Ditto ditto on "Druid's" cargo ditto ditto on 8,458 <i>l.</i> 0 <i>s.</i> 9 <i>d.</i> for 120 days....	139	0	8	..		
33. „ Ditto on the remainder of the losses, &c. from the dates set forth in the exhibit annexed to the affidavit of Thomas Harrison, sworn 1st March, 1855, until paid	20,408	0	5	1,593	9	10

With interest thereon at the rate of 4 per cent. per annum from the 4th January, 1852, until paid.

(Signed) H. C. ROTHERY,
H. M. Registrar.

The following are the Registrar's Reasons for the Report:—

This is a claim arising out of the capture, on the coast of Africa, in the early part of the year 1850, of a small vessel called the Levin Lank, by her Majesty's sloop of war Ranger, on the ground that she was engaged in carrying on the slave trade. Registrar's report.

The circumstances of the case are as follows:—The Messrs. Harrison and Co. of Liverpool, the Appellants in this case, appear at the period in question to have been very extensively engaged in the palm oil trade, from the west coast of Africa, and for the Facts of the case.

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Registrar's
report.

purpose of carrying on that trade they had establishments at several points along the coast, and amongst others one at Benin. The factory at Benin is situated at some little distance up a river of that name, and as the bar prevents the passage up of large vessels, the practice appears to have been to bring the palm oil casks down to the mouth of the river, and there put them on board the vessels destined to convey them to this country. For this purpose, and also to obtain the means of readily communicating with the other establishments of the Messrs. Harrison on the coast, a schooner called the *Maria Louisa* was for some time employed by Mr. Henry, their agent at Benin. In the month of April, 1849, however, information having being brought to Benin, that the *Maria Louisa* had been lost, the agent, with a view to supply her place, purchased the *Levin Lank*, a small American schooner of about ninety-three tons, then lying in the river, almost all her crew being dead. The *Maria Louisa* subsequently arrived at Benin, but in a very damaged state, and the *Levin Lank*, having been found well adapted for the purpose, was employed in conveying the palm oil casks from the factory to the vessels at the mouth of the river. Subsequently the *Maria Louisa* was repaired and was likewise employed on the same service, but having been again seriously damaged in crossing the bar of the Benin river, and there being neither workmen nor materials at that place to repair her, Mr. Henry, on the 4th of January, 1850, dispatched the *Levin Lank*, in charge of Joseph Tuzo as Master, and with a crew consisting of Charles Clements as mate, Joseph Wallman as seaman, seven Kroomen, and a Benin boy, to Accra, to fetch the necessary materials and workmen.

Capture of the
vessel.Her condem-
nation at St.
Helena.

The *Levin Lank* arrived at Accra on the 15th of the same month, and having taken on board three coopers, and two other persons to act as cook and steward, she left that place on the 19th to return to Benin, and was captured on the following day by her Majesty's sloop *Ranger*, Thomas Miller, Esquire, commander, and was thereupon dispatched to Saint Helena for adjudication. After very considerable delays, into the particulars of which it is not necessary here to enter, the *Levin Lank* arrived at Saint Helena, and proceedings having been commenced against her in the Vice-Admiralty Court there established, she was ultimately condemned as a slave vessel, and was thereupon broken up and the materials sold in separate portions.

From this decree an appeal was prosecuted to her Majesty in Council, and the case having been referred in the usual manner

to the Judicial Committee of the Privy Council, their Lordships were pleased to report to her Majesty their opinion in favour of the appeal, that the decree of the Vice-Admiralty Court ought to be reversed, and that the schooner or vessel Levin Lank and her cargo ought to be restored, or the value thereof paid to the owners, and that Commander Miller and the rest of the officers and crew of the sloop Ranger ought to be condemned in all costs, charges, losses, damages, detriments, demurrages, and expenses which have arisen by reason of the seizure and detention of the schooner and her cargo.

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Registrar's
report.

Decree reversed on
appeal, and
captors condemned in
costs and
damages.

Such are the terms of their Lordships' decree, and the first question that has been raised is as to the extent of the damages to which the captors are liable under this decree, and whether they are bound to make good not only the losses directly occasioned by the capture and detention of the Levin Lank and her cargo, but those also indirectly arising therefrom, and which are commonly called "consequential damages."

The Messrs. Harrison state that soon after the capture of the Levin Lank several of their vessels arrived off the mouth of the Benin river to take in palm oil, that they had abundance of oil at the factory, but were obliged in consequence of the loss of the Levin Lank to ship the casks at great risk in the small open boats of the country, and that their vessels were in consequence detained for a considerable time; and they claim compensation both for the demurrage of their vessels, and for the loss which they conceive they have sustained by the depreciation in the market at Liverpool of the price of palm oil between the time when the cargoes might have been delivered there, had the Levin Lank not been taken from them, and the time when the cargoes were actually delivered.

Nature of
owner's claim
for damages.

They also state that some articles of merchandize, which were a mere drug at some of their settlements, would at the same time have fetched a high price at another, and that, had they had the Levin Lank at their disposal, they would have realized very large profits, by conveying in her the goods to those settlements where they were most needed, and they therefore claim compensation, not only for losses actually sustained, but for the profits which they were prevented from making by the loss of the Levin Lank.

They claim in fact for losses of this description from the time of the capture of the Levin Lank until the 31st day of

1856. October, 1852, when another tender called the Visitor, which
 Feb. 8. had been purchased by them and sent out from this country,
 Registrar's ultimately arrived at Benin to supply the place of the Levin Lank.
 report. Such is the general character of the Messrs. Harrison's claim,
 amounting in the whole to no less a sum than 20,408*l.* 0*s.* 5*d.*,
 although the vessel itself is valued at only 1,400*l.*

Delay in ob-
 taining another
 tender.

Now, the first question which presents itself in considering the claim, is, how it came to pass—if the want of a small tender on the coast occasioned the Messrs. Harrison such heavy losses and prevented them from realizing such large profits,—how it came to pass that they did not send out another tender to supply the place of the Levin Lank at an earlier period than the 31st of October, 1852. Mr. Harrison stated at the reference that the first intimation which he received of the capture of the Levin Lank, and of her being sent to Saint Helena for adjudication, was on the 8th of July, 1850. He knew the number of vessels his firm had despatched to the coast of Africa for palm oil, and yet it is not until about two years after he knows of the capture of the Levin Lank, that he takes measures to supply her place by purchasing and sending out another tender.

Captors not
 responsible for
 this.

Is it, then, right that the captors should be condemned in these enormous damages, which are said to have arisen from the want of a tender on the coast, when that want might have been supplied by the Messrs. Harrison at a much earlier period than it was? Mr. Harrison stated, at the reference, that the reason of their not having sent out another tender sooner was, that it was not convenient to them at that time to provide the funds necessary for the purpose. But are the captors responsible for this, and are they liable for all damages that may have arisen from the want of a tender, until it became quite convenient to the Messrs. Harrison to provide one?

Case of the
 Columbus.

The principles which govern cases of this description are so clearly laid down in the judgment of Dr. Lushington in the case of the Columbus (*a*), and to which we have been referred by the Queen's Proctor, that I cannot do better than quote the words of the learned Judge. He says, "I take the rule to be this,—in the case of a total loss you calculate the value of the property destroyed at the time of the loss, and pay it to the individual as a full indemnity to him for all that may have happened to him, and you never can by possibility enter into an examination of

(*a*) Notes of Cases, vol. 6, p. 674.

what might have been gained by an adventure of this description. I see no limit to the principle; if it were once admitted, it would not be simply in cases where it was confined to the value of the ship, but there would be all sorts of ramifications, the profit to be derived from the voyage, or, indeed, from the return voyage, which might be said to have been defeated by the collision. I am of opinion, on that ground alone, that I cannot maintain this claim."

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report.

Such, then, are the principles which must guide us in dealing with this claim, unless indeed there be anything in their Lordships' judgment which would take it out of the ordinary course, and which would show that it was their Lordships' intention to give the claimants consequential damages, and for which we must refer to their Lordships' judgment.

Is there any-
thing excep-
tional in this
case?

Although this judgment has not yet been reported, Mr. Moore, the reporter of the Privy Council, has kindly favoured us with a transcript of his notes, and from it we extract the following passage, which refers more particularly to this part of the case. The learned Lord, who delivered the judgment, was Dr. Lushington, the same who pronounced the decision in the case of the *Columbus*, which we have quoted above. His words, as reported to us, are these:—"Now, taking all the facts of this case into consideration, it really does appear, without going further into the evidence, that there was no just ground for the seizure. The only decree we can make is that the decree of the Court below be reversed, and the vessel restored with costs." Not a word is here said about the consequential damages claimed by the Messrs. Harrison; it is a simple decree of restitution, with costs and damages, and as such should come under the principle laid down in the case of the *Columbus*.

Their Lord-
ships' order
was a simple
decree of res-
titution with
costs and
damages.

Much stress was laid by the claimants upon the words of the decree itself, as it is found entered in the Court Assignment Book, and by which the captors are condemned "in all costs, charges, losses, damages, detriments, demurrages, and expenses which have arisen by reason of the seizure and detention of the schooner and her cargo." These words are, it must be confessed, very wide and general, and would, at first sight, seem to carry with them consequential damages. They are not the words usually employed in cases in which restitution takes place with costs and damages, and how these words came to be used in entering the decree, I confess that I am at a loss to understand. It occurred before I was appointed Registrar, and arose probably from fol-

Entry of decree
in somewhat
wider terms,

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Registrar's
report.but does not
carry the case
any further.

lowing the terms of the Appellant's prayer, instead of the words usually adopted in entering decrees of this kind.

But after all the question is, whether these words carry the case any further, and I am clearly of opinion that they do not. The losses, damages, detriments, demurrages, and expenses, must be such as are legally and properly due, and not any and all losses that might, under certain contingencies, have possibly arisen. Looking then at all the facts of the case, at the words used by their Lordships in giving judgment, looking also to the very clear and decided opinion expressed by Dr. Lushington in the case of the *Columbus*, that "you never can by possibility enter into an examination of what might have been gained by an adventure of this description," we are all clearly of opinion that there is not sufficient evidence before us to show that it was their Lordships' intention to award more than the ordinary costs and damages to the claimants. The owners will be entitled to be reimbursed to the full extent of their losses, but cannot claim for profits, which, though possible, might in fact never have been realized.

Value of the
vessel.

Such, then, being the general principle upon which the claim of the Messrs. Harrison must be dealt with, let us now proceed to consider its details. The first item is a charge of 1,400*l.* as the value of the schooner at the time when she was captured. It has been objected by the Queen's Proctor that this item is excessive in amount, the vessel being only ninety-three tons burthen; but it must be remembered that the value of the vessel is to be taken, not at the price at which a similar vessel might have been purchased in this country, but at her value on the coast of Africa. Now, it appears from the affidavit of Mr. Henry, the agent at Benin of Messrs. Harrison and Company, that the *Levin Lank* was purchased by him of the then supercargo and captain on the 7th May, 1849, for the sum of 1,400*l.* British sterling, but that not having sufficient specie in his possession, it was agreed between them that she should be paid for in goods to that amount, and accordingly the various articles enumerated in the Schedule A. annexed to Mr. Henry's affidavit, were taken by the supercargo in satisfaction of his claim, and at the prices stated therein. And as this person was doubtless as fully cognisant as Mr. Henry of the values of the several articles enumerated, and as it was as much the interest of the former to depreciate, as of the latter to augment, the price of each article, it may reasonably be presumed that the goods in the schedule were fairly priced, and that the *Levin Lank*, at the period of the sale, was well worth

the sum of 1,400*l*. There is no evidence offered on the part of the Crown in opposition to these facts, nor is there anything to show that the vessel had in any respect deteriorated, or that her value had fallen between the time of the purchase and the date of her capture by the Ranger. Under these circumstances we are of opinion that the value of the Levin Lank must be taken at the price stated by the claimants, namely, 1,400*l*.

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With regard to the second, third and fourth items, the value of the cargo, stores and provisions, on board at the time of the capture, they are sworn to, and are not objected to, and as they appear to be reasonable in amount, they must be allowed.

Value of goods.

The next item to be allowed is that marked No. 8, being the wages of six Kroomen, from the 4th day of January to the 1st day of March, 1850, the day on which they got back to Benin. The wages of these men are charged at the rate of 1*l*. 5*s*. per man per month, and should be allowed in full.

Wages of the
seamen;

Item No. 9, being the wages of the seaman Joseph Wallman, from the 4th January to the 21st March, 1850, the day on which he volunteered to the Ranger, must also be allowed in full; as must also item No. 10, being the wages of Charles Clements, the mate of the Levin Lank, from the 4th of January to the 15th of April, 1850, the day on which he got back to Benin.

Item No. 11 is a charge for the wages of Joseph Tuzo, the master of the Levin Lank, from the 4th January to the 20th of August, 1850, at the rate of 12*l*. per month. From Mr. Henry's affidavit it would seem that the master returned to Benin, with Clements, on the 15th of April, 1850, but that Mr. Henry was not able to find him any employment until the 20th of August following, when he put him in charge of the *Druid* as master; and accordingly a claim is made for his wages during the time he remained so unemployed. This, it appears to us, must be allowed, as must also item No. 12, being the cost of his board and maintenance at 3*s*. per day from the 15th of April, 1850, the day of his arrival at Benin, to the 20th of August following, when he took charge of the *Druid*.

of the master.

We shall also allow item No. 29, which is a charge of 1*l*. 10*s*. for postages and other petty disbursements.

With regard, however, to all the other items, we are of opinion that none of them can be allowed. Most of them are for con-

Other items of
the claims dis-
allowed.

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sequential damages arising out of the capture of the Levin Lank, and for which we are of opinion that the captors cannot be held responsible. The rest of the items are for expenses of the witnesses during their detention in this country to give their evidence in the cause. These charges also cannot form any part of the present claim; if chargeable at all, they must be included in the Proctor's bill of costs, and be taxed in the regular way, as a part of the expenses attending the legal proceedings. And as the Messrs. Harrison and Co. have lost the services of the Levin Lank from the 4th of January, 1850, interest would ordinarily be allowed at the rate of 4*l.* per cent. per annum from that time until the day of payment. But as a period of between two and three years were allowed to elapse from the time of their Lordships' report, before the claimants thought proper to bring in their claim for damages, we shall only allow interest from the 4th of January, 1852.

Appeal Registry, 8th November, 1855.

H. C. ROTHERY,
Her Majesty's Registrar.

Addams and Rolt for the appellants.

The *Queen's Advocate* and *Jenner* for the respondents.

Report con-
firmed with
costs.

Their Lordships, without hearing counsel for the respondents, affirmed the report of the Registrar, and stated that looking to the exorbitancy of the claim, and the large deductions which had been made, the appellants must pay the whole costs of the reference and of this motion.

Her Majesty's Proctor for the captors.

Rothery for the owners of Levin Lank.

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*The High Court of Admiralty.**THE JAMES, STONEHOUSE, Master.**Ship—Collision—Merchant Shipping Act, 1854—Both ships in fault—Damages divided.*

The Confucius, of 178 tons, was lying-to, close-hauled on the port tack, her helm lashed a-starboard; the James, of 236 tons, was lying-to, close-hauled on the starboard tack, her helm a-port; each vessel a little on the port bow of the other; a collision ensued, by which the port bow of the Confucius was stove in, and she sank. Held, that the Confucius was to blame for not having ported her helm in time, and the James for not having thrown back her head yards when the collision was probable; and that the damage should be divided.

THIS was a cause of damage, brought by the owners of the late vessel Confucius, against the brig James, to recover the amount of damage occasioned by a collision off the Yarmouth-roads. The action was entered in the sum of 7,500*l*. On behalf of the Confucius it was stated, that she was proceeding from Grangemouth, in Scotland, to Woolwich, with a cargo of shell;—that on the night of the 10th October, about 6.30 p.m., she was off the coast of Norfolk, and the night being dark and the wind fresh from about W., the master determined to lay-to till daylight,—that accordingly, the mainyard of the said vessel was laid to her mast, and single-reefed foretoppsail, foresail, and foretop-mast staysail set, and that the helm was lashed a-starboard to keep her to;—that a bright signal lantern was lashed on the port cathead, which showed a good light all around, and that a good look-out was kept. That soon after midnight the second mate reported a vessel without a light on the port bow, which afterwards proved to be the James, distant rather less than half a mile, and approaching the Confucius; that the helm of the Confucius was accordingly put hard a-port, and the master and the rest of the watch on deck hailed loudly to those on board the James to port their vessel's helm, but that no attention was paid to such hailing, and that the James ran down with the wind free, and came stem on under the influence of her starboard helm, and struck the Confucius a violent blow on her port bow, carried away the port cathead and lantern, and stove in her port side. The master and crew of the Confucius, finding that the vessel was fast sinking, took to their boat, and she almost immediately afterwards sank, and was totally lost, with everything on board. The libel alleged that the collision and losses consequent thereon were imputable

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solely to those on board the *James*, for not having kept clear of the *Confucius*, as she might and ought to have done, and from her having starboarded her helm.

On behalf of the *James* it was stated, that the value of the *James* was 1,200*l.* only;—that she sailed from the port of Hamburg on 6th April, 1855, in ballast, bound for Shields in the river Tyne;—that on the night in question, 10th October, she bore up for Yarmouth-roads, and at midnight was laid-to on the starboard tack, with the mainyard to the mast, under double-reefed topsails, foretop-mast staysail and trysail, the foresail being hauled up and the helm secured hard a-lee with the tiller-rope; that a lighted signal-lantern, burning brightly, was hanging over the port bow, and that a good look-out was kept on board. That shortly before the collision one of the look-out observed the light of the *Confucius* about one point on the lee or port bow, and instantly reported the same to the master, who came forward at once to the weather bow, and one of the watch held the lantern, which was hanging alight over the said brig's port bow, up towards the strange vessel in such a direction as that the same could be best seen by those on board of her. That some one on board the *Confucius* called out, "Keep your helm a-port;" to which it was replied, "It is hard a-port," and the master gave orders that the helm should not be moved. That at that time the *James* was lying S.W. by S., and as close to the wind as she could, and her helm was kept hard a-port without any alteration whatever; that the *Confucius*, however, which had ported her helm, and was passing to leeward of the brig, caught the jibboom of the brig with her larboard forerigging, broke the jibboom, and taking the brig's bowsprit between her masts, hauled her round before the wind, with her head to the eastward.

Addams and *Twiss* for the *Confucius*.

Bayford and *Deane* for the *James*.

The Court was assisted by Captains *Ellerby* and *Shuttleworth*.

Judgment.

Dr. LUSHINGTON thus addressed the Trinity Masters thereupon:—Gentlemen, you are perfectly well acquainted with the case of both the parties. You have not only read, but had read to you in part, the libel which states the case of the *Confucius*, and also the allegation which states the case of the *James*,

the vessel proceeded against. All the important parts of the evidence have also been brought to your attention, and you have heard the arguments of counsel. Now, it would be perfectly useless for me to go over the statements at length, or to comment on the arguments at all. The course I propose is this,—to state to you what I conceive to be the indubitable facts in this case, and then, as to those matters upon which you may be in doubt, you must form such an opinion as that they may be in conformity with those upon which you have no doubt. I know no other mode of getting out of these difficulties, which frequently occur in this species of case, than by first satisfying your mind what is clearly and distinctly proved, and then making other circumstances bend to that proof where the evidence is not so clear. Now, allow me to trespass upon your time very briefly by stating the facts admitted in this case, or distinctly proved. The Confucius was a heavily-laden vessel; the James was a light vessel; both vessels were lying-to, both being desirous of not entering the Cockle Gat by night. It appears they were on different tacks—the Confucius on the port tack, with her helm lashed a-starboard; the James on the starboard tack, with her helm lashed a-port. The tide at that time was ebbing. I do not presume to comment on these facts, because you are more able to form a judgment upon them than I am. You well know the effect which would be produced upon a vessel lying-to by the ebb or flow of the tide. It would be mere presumption if I were to dwell at length on these matters. You will bear in mind that the tide was ebbing, and the effect that that might have on the one or the other vessel. The wind, it is stated, was from about west-north-west. I do not know, with precise accuracy, the quarter; we seldom do; we take it, according to the statement of both parties, to be west-north-west. If it was at this point, both vessels were close-hauled; and then the head of the Confucius would be about north to north-by-east, and the head of the James about south-west to south-west-by-south. Now, these vessels, having this relative bearing to each other, were seen when above or at least a quarter of a mile distant from one another. And you will not forget that a quarter of a mile, under the circumstances in which these vessels were, namely, lying-to, is very different from a similar distance when vessels are approaching each other with rapidity, are meeting, for instance, at the rate of eight knots an hour. Then, with regard to the mode of collision, it appears to me to be proved by this evidence that the Confucius was struck by the stem and starboard bow of the James, and that she was struck on the port bow. That I take to be a clearly

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Admitted facts
of the case.

Both vessels
lying-to see
each other a
quarter of a
mile off.

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The Confucius
ported; did
she port in
time?

That is a ques-
tion for the
Trinity Mas-
ters.

Did the James
starboard her
helm?

Could she have
done anything
to prevent the
collision?

proved fact in this case, and a most important fact it is. The next question is, what did the Confucius do? It is clearly proved, indeed not denied, that she did port her helm; and the only question with regard to the Confucius is, did she port her helm in time? Now, gentlemen, the evidence has been read to you, and I will merely advert to that shortly. The evidence with respect to the time at which the Confucius ported her helm after having discovered the James, is given in answer to an interrogatory, and it clearly appears, according to that evidence, that she did not port her helm on descrying the vessel the James. All the witnesses admit it was not done immediately. What they prove is that there was an interval of time between descrying the James and porting the helm of the Confucius, that they took time to ascertain the course she was on. Port her helm immediately, she did not; but the master swears, and the other witnesses swear also, that something was done to assist the Confucius in wearing besides porting the helm. "I let go," says the master, "the lee mainbrace myself, and hauled in the port one to assist her in so doing." Now, you must determine on this evidence, gentlemen—for that is one of the questions on which I must request your opinion—whether you think there were any laches on the part of the Confucius, in not porting her helm with the expedition that she ought to have done; because, though it might be perfectly true, as argued by Dr. Addams, that it would not be in accordance with either common sense or the Act of Parliament, that when a vessel sees another, she should port *instantly*, yet there is a wide difference between doing that at the moment you see a vessel, not knowing what the effect may be, and taking more time than you ought to do so—standing still, when you ought to be doing something. So much as regards the Confucius. Now with regard to the James. The evidence, as far as the evidence goes, is, that the helm of the James was not starboarded, which is the charge made. If we are to believe the evidence, then unquestionably the James did not commit that fault which has been imputed to her; but if you should be of opinion, from the facts and circumstances I have stated, that the collision could not have taken place unless the James had starboarded her helm, then you must disbelieve the evidence, and act according to the dictates of common sense in drawing your conclusion. Whether that is so or not, I leave entirely to your consideration. But there is one other circumstance that I must call to your attention; that is whether, independently entirely of the question whether the James starboarded her helm or not, there was any other thing which she

might have done in order to prevent the collision which actually took place? I do not attempt to bring under your notice the argument that was adverted to, namely, whether one vessel or the other was in motion, and that for a very obvious reason—because you know better than I do. These are the questions on which I wish to be informed of your opinion. [After consultation:]—The gentlemen with whose assistance I have been favoured are of opinion that the *Confucius* was to blame, there having been culpable delay in porting her helm. They are also of opinion that the *James* was to blame for not having done all in her power to avoid the collision; and that she ought to have thrown back her head yards when she saw that a collision was likely to take place. The Court thereupon pronounced an interlocutory decree that the parties had, in part only, proved the contents of the libel and allegation by them respectively given in; that the collision in question in this cause was occasioned by the default of the master and crew of the said ship or vessel *James*, and the master and crew of the said late ship or vessel *Confucius*; that the damage arising therefrom ought to be borne equally by the owners of the said ship or vessel *Confucius*, and the owners of the said ship or vessel *James*, and for a moiety only of the damage proceeded for in this cause; and condemned the said *Harriet Lawson* and others in the said moiety of the damage proceeded for, and referred the same, together with all accounts and vouchers brought in, or hereafter to be brought in, or relative thereto, to the registrar and merchants, to report the amount thereof, but made no order as to costs.

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Both vessels to blame.

Court directed the damages to be divided.

F. Clarkson, proctor for the *Confucius*.

Stokes for the *James*.

From this decree an appeal was prosecuted to her Majesty, and the report of that appeal immediately follows.



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Feb. 9.

In the Privy Council.**Present**—The Right Hon. T. PEMBERTON LEIGH.

The Right Hon. Sir EDWARD RYAN.

The Right Hon. Sir JOHN PATTESON.

The Right Hon. Sir WILLIAM H. MAULE.

THE JAMES, STONEHOUSE, Master.***Ship—Collision—Merchant Shipping Act—Both Ships in fault—Damages pronounced against.***

The rule laid down by the Merchant Shipping Act, 1854, sect. 296, as to cases of collision, is, that when there is danger of a collision each vessel shall port her helm; the penalty is, that if a vessel neglect to port her helm she cannot recover anything, even if the other vessel is also in fault. The section is not confined to cases where one vessel only is in fault, and applies also to the case of vessels lying-to.

Bayford and *Forsyth*, for the Appellants, contended that the *James* was not in fault at all, and that the ground on which she had been found culpable was never suggested in the pleadings; otherwise the objection might have been shown, by evidence, to be groundless, and an opportunity ought still to be allowed to them to do so (a): moreover, the evidence showed that in point of law the *Confucius* could not recover (b). The rule of the Court of Admiralty no way differs from that of Courts of Common Law in such circumstances. And such a case was expressly provided for by the Merchant Shipping Act, 17 & 18 Vict. c. 104, which enacts (sect. 296), " whenever any ship proceeding in one direction meets another ship proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other, and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger." Then the sect. 298 proceeds, " if in any case of collision it appears to the Court, before which the case is tried, that such collision was occasioned by the non-observance of the foregoing rule as to the passing of steam and sailing ships, the owner of the ship by which such rule has been infringed shall not be entitled to

(a) *Vaux v. Shepherd*, 8 Moo. P. C. 21; *Morrison v. Steam Navigation Company*, 8 Exch. 733.

75.
(b) *Vennall v. Garner*, 1 Cr. & M.

recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court, that the circumstances of the case made a departure from the rule necessary." Those clauses were applicable not to the case merely where one party was in fault, but where both were so (a).

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Addams and *Twiss*, for the respondents, contended, that the decree should be affirmed. In cases of collision, where both were to blame, the rule is that the damages are equally divided (b). This was not a case within the provisions of the Merchant Shipping Act, as the vessels were not in the position contemplated by that Act.

Bayford replied.

Feb. 12.

The Right Hon. T. PEMBERTON LEIGH :—The ship *James* was sued for a total loss of the ship *Confucius* and her cargo, occasioned by a collision, which was alleged to have taken place entirely through the misconduct of the *James*. The damage was laid at 7,500*l.*, the *James* being worth only 1,200*l.* Bail was given in 1,400*l.*, beyond which sum the Plaintiff could not recover in this suit. The law of the Court of Admiralty, subject to the alteration introduced by the 14 & 15 Vict. c. 79, and the 17 & 18 Vict. c. 104, was, that where both vessels were in fault the damage was to be divided equally between them. In this case both vessels were held to be in fault. Half of the loss would greatly exceed the whole value of the *James*; it was therefore said to be indifferent to the owners of the *Confucius*, whether they were or were not properly held to be in fault; at all events they have not appealed from the judgment. The parties interested in the *James* have raised three points :—First, that they were not in fault at all, consequently the action ought to be dismissed with costs; secondly, that the matter, with respect to which they had been said to be in fault, was not alleged in the pleadings, or proved in the evidence, and therefore that it was quite inconsistent with the case actually alleged and attempted to be proved against them; and, thirdly, that, whether the *James* was in fault or not, the fault of which the *Confucius* herself had been found guilty was one which, under the 296th and 298th sections of the Merchant Shipping Act, precludes her from recovering against the *James*. If the last point is in favour of the Appellants, the others are immaterial. It is undisputed that the *Confucius* neglected to

(a) *The Telegraph*, 8 Moore, P. C. 167.

(b) *The Sylph*, 2 Eccl. & Adm. Rep. 86.

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Vessels lying-
to come within
the provisions
of the Act.

James partly to
blame.

Confucius
also to blame
for having
ported too late,
and therefore,
under the
statute, cannot
recover any
part of her
damages.

Suit dismissed,
but without
costs.

port her helm in due time, which it was her duty to do, quite independently of the Act of Parliament. It is said, however, that the ships were not in the position contemplated by the 296th section; that they were not proceeding on their several voyages when the collision took place, but were lying-to, the one with her head towards the north, and the other towards the south. When they first descried one another, they were at a distance of about a quarter of a mile, approaching each other, one with the tide and the other against it. The words of the sections referred to must extend to such a case as the present. The object of the Act was to provide fixed rules, in order to avoid collisions at sea, when vessels are approaching each other in different directions; and their Lordships are of opinion that these vessels were in such circumstances as to bring them within the meaning of the Act. It is said that the collision was in part occasioned by the James, and such is the opinion of the nautical gentlemen by whom their Lordships are assisted (a); but to say that the statute does not apply, because the damage was not occasioned solely by the Confucius, would be to render the statute quite inoperative. The intention of the Legislature was to enforce certain general rules by additional penalties, besides those already existing. The rule is, that when there is danger of a collision, each vessel shall port her helm; the penalty is, that if a vessel neglect to port her helm, she cannot recover, whatever she might have otherwise recovered in the Court of Admiralty from the other vessel when also in fault. This is the construction put by Dr. Lushington on the 14th & 15th Vict. c. 79 (which for this purpose may be considered as the same as the Merchant Shipping Act, 1854), in the case of the *Aliwal* (b); and by Lord Campbell in *Dowell v. The General Steam Navigation Company* (c). Their Lordships are, therefore, of opinion, that the suit in this case cannot be maintained. It is true that this point was not argued in the Court below; their Lordships regret that such should have been the case, and that in this, as in some other cases, they are obliged to decide on a point which was not brought under the notice of the learned Judge of that Court. They must recommend that the sentence of the Court below should be reversed, but that no costs of the appeal be allowed to either side.

Stokes, proctor for the James.

F. Clarkson for the Confucius.

(a) The Court was assisted by Mr. John M'Donald and Mr. James Brown, sailing masters in the Royal Navy, and the masters attendant at

Woolwich and Sheerness dockyards respectively.

(b) 1 Ecch & Adm. Rep. 99.

(c) 1 Jur. N. S. 800.

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Feb. 14.

*The High Court of Admiralty.*THE DUMFRIES, THOMPSON, *Master.**Collision—Foreign and British Vessels—Old rule of the Sea.*

In a case of collision, in which one of the vessels is foreign, the municipal law of Great Britain cannot apply, but the case must be decided by the general maritime law which is common to all nations.

The schooner C. with a bright light on her bowsprit end, steering north, with a stiff breeze from S.W., saw a light about two cables length off, a little on the port bow, and immediately put her helm hard a-port; the barque D. close-hauled on the starboard tack, steering S.S.E., saw the light of the C. two or three points on her starboard bow, showed a light and kept her course, clean full, till she found the C. crossing her hawse, when she put her helm hard a-port:—Held, that the D. was solely to blame, and that for not having ported her helm earlier.

THIS was a suit promoted by the Danish schooner Christina and Maria, of the burthen of 127 tons, against the barque Dumfries, of the burthen of 318 tons, to recover for a total loss occasioned by a collision between them, at 11 p.m. on the 5th of November last, off Whitby. The schooner was bound from Hamburg to Newcastle-on-Tyne in ballast; the barque was proceeding from the river Tyne to New York with a general cargo. On behalf of the schooner it was stated that it was blowing a stiff breeze from the S.W.; that she had a light burning brightly from her bowsprit end, which was visible fully three-quarters of a mile off, although the atmosphere was so dark and thick that a vessel without a light could not be seen at a greater distance than two cables' length; that she suddenly discovered the barque at the latter distance, a little on her port bow, and immediately ported her helm, and fell off until her sails shook; and that the barque, without making the slightest alteration in her course, ran right into the schooner, and cut her down to within a plank of the water's edge, in consequence of which she ultimately sank. She attributed the collision to the want of a good look-out on board the barque, and to her not exhibiting a light. The barque in her defence alleged that she was close-hauled on the starboard tack, and that she descried the schooner two or three points on her weather bow; that a patent globe lantern was instantly held up by one of the crew on his head; that the schooner attempted to cross the hawse of the barque, whereupon the pilot on board ordered the helm to be hove hard a-port, and hailed the schooner; but before the barque could come up into the wind the schooner, continuing her course, caught her and broke her jibboom, and did her other damage. She attributed the accident to the want of good seamanship on the part of the schooner in not keeping to windward of the barque.

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The Court was assisted by Captains *Pixley* and *Pelly*.

Addams and *Twiss* were heard for the schooner.

Bayford and *Deane* for the barque.

Judgment.
There being no
cross action,
the burden of
proof lies on
the party pro-
ceeding.

Collision being
between a
foreign and a
British vessel,
the Act of
Parliament
does not apply,
but the case
must be de-
cided by the
ordinary mari-
time law.

Ordinarily by
this law the
vessel on the
port tack must
give way to a
vessel close-
hailed on star-
board tack.

Was it the
duty of the
Dane to port?

Dr. LUSHINGTON, addressing the Elder Brethren, said :—
Gentlemen, in this case it has been very truly observed on the part of the *Dumfries*, that as there is no cross action, the burden of proof falls entirely upon the Danish vessel, to make out her case, and to show, if she can, that the *Dumfries* was solely to blame. It is not alleged on the present occasion that this accident arose from inevitable circumstances, consequently that view of the case may entirely be laid out of consideration; and the question which we shall have to determine is, where the blame rests. I am happy to say that in this instance we are relieved altogether from the consideration of what is the true construction to be put on the Act of Parliament, which is so often brought under your notice; because, this being a collision on the high seas, between a foreign and a British vessel, it appears to me that we cannot apply the Act of Parliament, but that the case must be governed entirely by ordinary nautical rules, and that you must direct your attention to it in that point of view, and give me your opinion what is right and wrong according to your nautical experience in matters of this kind. You have heard a great deal as to porting and not porting the helm. It appears to me, having now heard the opinions of Brethren from the Trinity-house for many years, that that entirely depends on the facts in each individual case. The principle, which is clear enough, is this: that if a vessel on the port tack meets a starboard-tack vessel close-hauled, it is the duty of the former to give way; and I apprehend that if there is any probability of a collision, according to the ordinary rule the vessel on the port tack is to port her helm. We must always remember the condition is, if there is a probability of collision. If the *Dumfries*, approaching, as in this case, from the N., she going from N. to S., had been seen five or six points on the starboard bow of this Danish vessel, I should conceive it to be quite an absurdity to say that, under these circumstances, the latter was bound to port her helm. Now, gentlemen, we will look a little at the facts of this case, and see whether it really was a case in which it was the duty of the Dane to have ported her helm; because the charge preferred is, that she did port her helm,—not that she ported too late, or too soon, or not sufficiently,—but it is said that she ought not to have ported at all; that she ought to have kept her course. That is the defence on the

part of the Dumfries. According to the two statements, the matter stands thus :—On behalf of the Dane it is said that the Dumfries was seen about one point on the port bow ; on the part of the Dumfries it is said that the Dane was seen about two and a-half points on the starboard bow of the Dumfries. Now with regard to vessels being seen either upon one bow or upon the other there is often great discrepancy ; but we have always gone on this principle, that if there is a reasonable apprehension of the two vessels coming into collision—not calculating with very precise accuracy whether it is one point or two,—but if there is any reasonable probability of collision, you must follow the rule of porting the helm. You have the facts before you, and you will be able to tell me whether, under these circumstances, you consider it to have been the duty of the Dane to do what she did—port her helm ; or whether you think that it was absurd in her to take that course, and that she ought to have kept her course or starboarded her helm. A good deal has been said as to the impossibility of this collision taking place, supposing the facts to have been precisely as stated by the Dane. If we are to take the statement as it is here set forth—if we are to suppose that the Dane actually came round with her head to the east, and that she did not back her sails—I apprehend it would be very improbable indeed ; but you must look at the whole evidence together, and see what is the real meaning of it. We must not fix ourselves upon any isolated expression. With regard to the conduct of the Dumfries, her statement is that she discovered the Dane a mile and a-half off ; and from the rate at which these vessels were approaching, that space would be speedily gone over. As to any precise accuracy of time or distance between vessels being seen from each other and their coming into collision, it is almost impossible to depend upon the evidence of the witnesses in these respects. The question, then, is, what ought the Dumfries to have done ? What she did was this :—her sails were kept full-and-by, according to her own statement, and then, at last, seeing that the Dane was what she calls crossing her hawse, she put her helm hard a-port, but certainly not in time to produce any effect at all. You will have to determine this,—whether the Dumfries did right in adopting this measure, under the circumstances, and according to the evidence before you. A word or two as to the lights. It appears that the Dane carried a light, and there is no dispute as to her having done all that was right in that particular. It appears the Dumfries did not carry a light, but she had a light ready to show, and, according to the statement of those on board her, as soon as they discovered the light of

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Did the Dumfries do right in keeping her course.

Dane carried a light.

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*Feb. 14.*Dumfries
showed one.Parts of the
vessels which
came into col-
lision.

the Dane approaching, they showed that light. Whether, looking at the nature of the night, it was expedient not to carry a light, I give no opinion. It is not represented as having been an exceedingly hazy or foggy night. It is said that a light could have been seen from a mile and a-half to two miles off, but that the vessel itself could not be seen at a greater distance than two cables' length. You are better judges of the distance at which vessels can be seen at sea than I am. I will very briefly direct your attention to the mode of collision; and I apprehend, that if we are to take it as admitted, that the vessels came into collision—I care not about the expression which struck first, that is a mere play of words—by the Dumfries with her larboard bow, or nearly her larboard bow, striking the schooner a little abaft the mainmast on the port side; then you will be able to judge from that whether or not, by adopting measures at an earlier period, this collision could not have been avoided altogether. These are all the facts, and the only question which I have to ask you is, whether you are of opinion that the Dumfries was solely to blame for the collision, or whether you impute blame to the Dane?

DR. LUSHINGTON, after conferring with the Elder Brethren, said :—The gentlemen entertain no doubt upon this question. They are of opinion that the Dumfries was solely and entirely to blame, and that for not having ported her helm at an earlier period.

Decree accordingly.

Stokes, proctor for owners of Dumfries.

Deacon for the Christina and Maria.



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Feb. 20.MARIA LUISA, V. ESCEJADILLO, *Master*.*Salvage — Jurisdiction of Cinque Ports — 460th Section of Merchant Shipping Act.*

The High Court of Admiralty had a concurrent jurisdiction within the boundaries of the jurisdiction of the Cinque Ports; and this remains unaltered by 460th section of Merchant Shipping Act, the 476th section of which sustains the general jurisdiction of the Court of Admiralty in salvage in the widest terms.

THIS was a case of salvage service rendered by a Ramsgate lugger to the *Maria Luisa*, a Spanish vessel. The place where the service was rendered was pleaded to be within the boundaries of the jurisdiction of the Cinque Ports (a). The action was entered in the sum of 500*l*.

Jenner and *Deane* appeared for the salvors.

Bayford and *Twiss* for the *Maria Luisa*.

At the hearing of the cause *Dr. LUSHINGTON* expressed a doubt as to the effect of the 460th section of the Merchant Shipping Act on the power of the High Court of Admiralty to adjudicate on cases arising within the jurisdiction of the Cinque Ports, and desired the point to be specially argued. He now gave judgment.

DR. LUSHINGTON :—This is a case of salvage performed within the boundaries of the jurisdiction of the Cinque Ports. The immediate question is, whether this Court has any jurisdiction, or whether its old jurisdiction is not ousted by the Merchant Shipping Act as to the particular locality. The 460th section commences :—" Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined;" and then it proceeds to point out what shall be done where the dispute arises "elsewhere in the United Kingdom." Before the modern statutes on the subject, jurisdiction was exercised on questions arising within the boundaries of the Cinque Ports by the Court of Admiralty of the Cinque Ports locally situated at Dover, and its power over such questions remains. But the

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Judgment.

Is the jurisdiction of the Court ousted?

It had concurrent jurisdiction in the Cinque Ports.

(a) The limits of the jurisdiction of the Lord Warden of the Cinque Ports are determined by 1 & 2 Geo. 4, c. 76, s. 18, for the purposes of that Act only.

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17 & 18 Vict.
c. 104, s. 476,
asserts juris-
diction of the
Court.

Is it elsewhere
in that act
restrained?

It is ousted in
all cases, if in
any;

but in fact it
remains as
before.

High Court of Admiralty had a concurrent jurisdiction, which was continually exercised. By recent statutes a limited jurisdiction has been given to commissioners to be appointed by the Lord Warden (1 & 2 Geo. 4, c. 76), and those sections of that Act are left unrepealed by 17 & 18 Vict. c. 120. Now, the 476th section of the Merchant Shipping Act asserts the jurisdiction of the High Court of Admiralty as to salvage services, subject to the provisions in the remainder of the Act, in the widest terms. There is nothing in the rest of the Act which restrains it on this point in express words. Is there anything which does so by inference? The first clause of the 460th section would leave a concurrent jurisdiction to the High Court of Admiralty, to the Court of Admiralty of the Cinque Ports, and to the Commissioners, unless it is to be read as if the word "there" stood before "determined." The Court is not warranted in introducing such a word unless, from the consequences which would result from its absence, it were clear that the Legislature must have intended its insertion. As far as consequences can be considered, there appears no reason why the concurrent jurisdiction of this Court should be taken away. It must be remembered that the present question is not, whether the Court shall be excluded from dealing with cases of small value within the jurisdiction of the Cinque Ports, but the exclusion, if at all, will extend to every case. It seems to have been the object of the Legislature, not merely to preserve the Court of the Cinque Ports, but all previously existing jurisdiction. If it is said that the decision I gave as to the remainder of the section in the case of the *Leda*, is inconsistent with my view of the present case, and that there is no reason why this Court should take cognizance of cases of small value from one part of the coast and not from another, I can only say that it is the clearly expressed intention of the Legislature that the jurisdiction within the limits of the Cinque Ports shall remain unaltered; and that the jurisdiction of this Court, whenever any dispute arises elsewhere in the United Kingdom, shall be limited as the remainder of the section does actually limit it. But the Court has always discouraged bringing cases of small value to be adjudicated upon here, and will continue to do so. On this question I pronounce for the jurisdiction of the Court.

Jenner, proctor for the salvors.

Gostling for the *Maria Luisa*.

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THE MOBILE, H. PONSONBY, *Master*.

Collision—Ship with wind free—Brig close-hauled on Starboard tack—Pilot on board, but not at the moment in charge of the Deck.

A ship going northward, in the Gull Stream, meets a brig close-hauled on the starboard tack, the wind from S.W., other vessels in the neighbourhood; the brig kept her course, and was held to be right in so doing. When a pilot is on board ship, he must be actually on deck and in charge, to relieve the owners of their responsibility.

THIS was a suit promoted by the Spanish brig Fenix, of the burthen of 290 tons, against the Mobile, of the burthen of 1,040 tons, to recover the loss arising from a collision between them at 12.30 p.m. on the 19th of August last, in the Gull Stream. The brig was proceeding from London to Cardiff in ballast; the Mobile was bound from Cananore, on the coast of Malabar, to London, with troops on board. According to the representation of the brig, when about midway between the Middle Brake and South Brake buoys, heading S.S.E. on the starboard tack, she descried the Mobile to the southward, distant about a mile, running to the northward. There was a brig to the northward on the Mobile's starboard bow, and a schooner a short distance to the windward of the Fenix, also on the starboard tack. The Fenix, under the direction of a pilot, held on her reach so as to round the Brake buoy and go into the Downs, expecting that the Mobile would alter her course and pass under the stern of the Fenix, instead of which she attempted to go a-head, and in so doing ran into her on the starboard side, and cut her down to the copper. The Mobile, in her defence, alleged that, having taken a pilot on board at Dungeness, the master, who had been on deck the whole of the two preceding nights, gave up the charge to him and went below. The pilot left the deck, and directed the second mate to steer the Mobile N.E. by N., in which direction she would have passed clear astern of the schooner and the Fenix, had they kept their respective courses. The schooner, instead of so doing, when she had approached the Mobile to within about 300 yards, suddenly hove in stays to go about on the port tack. The pilot, after an absence of five minutes, returned on deck, and, finding that the schooner had stayed on the Mobile's port bow, hailed the brig on her starboard side to port her helm, and at the same time ordered the helm of the Mobile to be also ported. The order

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was instantly obeyed, and both vessels paid off rapidly. The *Fenix*, continuing to keep her reach, was hailed to put her helm down and go about, the *Mobile* from the then position of the schooner being unable to pass under the stern of the *Fenix*. The *Fenix*, however, kept on her course, and ran into the *Mobile*.

The Court was assisted by Captain *Baz* and Captain *Pitcairn*.

Twiss and *Spinks* were heard for the *Fenix*; *Addams* and *Robinson* for the *Mobile*.

Judgment.

Admitted facts
of the case.

DR. LUSHINGTON, addressing the Elder Brethren, said:—Gentlemen, notwithstanding the immense discussion which this case has undergone, and though all the important parts of the evidence have been brought under your consideration, yet I feel it to be my duty to make some observations, at, perhaps, greater length than usual. It is a case in which the loss is very considerable; and it is not improbable, whatever may be our determination, that it may travel to another tribunal; and it is, I believe, the wish of that other tribunal to have a full exposition of all that takes place in this Court. Now, I must begin by stating the admitted facts in the case, and I shall do so in a few words. You will excuse the recapitulation, but they are in my judgment of importance as bearing on the points in doubt on the present occasion. The *Mobile* is a British vessel of 1,040 tons; the *Fenix* is a Spanish ship of 290 tons. The destination of the *Mobile* was to London from the East Indies with troops; the *Fenix* was bound from London to Cardiff, in ballast; the place was the Gull Stream; the time was noon on the 19th of August. As to the mode of collision some discussion has been raised, both in the pleadings and the evidence, as to which vessel struck the other, but it seems wholly immaterial; and I am rather surprised to find that witnesses have been examined from a shipwright's yard in order to show which of the two vessels ran into the other;—which was to be considered as the striking vessel. However this may be, the fact undoubtedly is that the stem of the *Mobile* came in contact with the starboard side of the *Fenix*, just abaft the fore chains. The wind was S.W. The *Mobile* was sailing at the rate of eight knots an hour; the *Fenix* at four and a-half. The course of the *Mobile* was N.E., or N.E. by E.; the course of the *Fenix* was S.S.E. As to the tacks, the *Mobile* had the wind nearly abaft; the *Fenix* was close-hauled on the starboard tack. Each vessel had a pilot;

the pilot of the Mobile was Birch; the pilot of the Fenix, Carter. The next question is, as to the position of the two vessels with reference to other vessels. Shortly prior to the collision there was a brig on the starboard side of the Mobile, pursuing the same course; on the port side there was a schooner on the same tack and course as the Fenix, and to windward of her. I take this to be the evidence. The Fenix must, I apprehend, have originally been on the port side of the Mobile. The next point will be, what measures were pursued by all these vessels. The Fenix kept her course, the schooner tacked short, the Mobile ported, and so did the brig on her starboard bow. Then as to the time when these measures were taken—that is most important, and will depend on the result of the whole of the evidence. It is clear, however, that the schooner tacked first, and that the Mobile did not port until after the pilot Birch came on deck; he ported the helm of the Mobile which would take her to the east of the schooner and under her stern; and the brig ported because the Mobile did. Now, bearing in mind some important facts before I come to the further evidence, it appears that the Mobile was running free, the Fenix close-hauled on the starboard tack; that the master of the Mobile was below, and so was the first mate. Now, gentlemen, arises a question which I must submit to you; but, as far as regards the law upon it, I entertain no doubt whatever. I hold that from the time the pilot went below, he was no longer in charge of the Mobile, but most distinctly the officer in charge of her was the second mate, who was on deck conducting the navigation of the ship. So long as the pilot is on deck, and capable of performing his duties, so long he is in charge: but Birch was below, and it is therefore utterly impossible to say that he had charge of the vessel. It has been said that blame is imputable to the pilot in this respect—that when he went below, he did not call the master but left the deck in charge of the second mate. It is very likely he was to blame in that respect, but that is not a species of blame upon which the owners of the Mobile can rely to exonerate themselves. They are bound to have competent officers. It is of no use for them to say, as it is represented by one of the witnesses the master did say, “I am poorly off for officers,” unless indeed some accident or death had occasioned it; they are bound to have a second mate competent to perform the duty; and if you should be of opinion that any blame attaches to the conduct of the second mate in this transaction, the owners are liable for his conduct. Now, to go on with the facts: Shortly before the collision, Birch, the pilot of the Mobile, had occasion to quit the deck. He says he had ordered the second

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Positions of
the vessels
with reference
to other vessels.

Manceuvres of
all the vessels.

Pilot not on
deck, therefore
not in charge
of ship.

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Pilot's evidence,

confirmed by others.

mate to keep N.E., or N.E. by N. It is ludicrous to suppose that he was to keep his course in disregard of all vessels that came in his way. What the pilot meant was—that is the course you are to keep, unless some circumstances spring up to render it necessary to deviate from it. The next part of the evidence is of very considerable importance. It is a matter of dispute between the parties under what particular circumstances Birch came on deck—whether he did so after the schooner had hove in stays, or when she was heaving in stays, or at what other time. He swears that, when he came on deck, having been absent five minutes, the Mobile was clear of the schooner, and that he did not port the helm to clear her, but to clear the Fenix, and to give her room to go round in stays. I think that evidence requires great attention, because it applies to two very important questions—whether Reilly, the mate, did wrong, or omitted to do what was right; and whether the Fenix was to blame in the charge imputed to her of not having ported her helm. The pilot says he hailed the Fenix to go round in stays, and he says there was ample time and space for her so to have done. He says he could do no otherwise, for if he had ordered the Mobile's helm to be starboarded after passing the schooner, the Mobile would have come into the Fenix amidships. According to this statement there was no time, after he came on deck, to have starboarded his helm, though he had the wind aft, and was going eight knots an hour, but yet he says there was time for the Fenix to have ported her helm, and to have hove herself into stays; and in addition to all that he swears that the collision took place within one minute after he had gone on deck. I will not bind him to one minute—we must give a certain latitude to witnesses when speaking of time. His evidence is confirmed to some extent by other witnesses, Captain Wallace and Major Priestley, one says a minute, another two or three minutes. The mate says it was from eight to ten minutes before the collision took place. It was candidly admitted by the Counsel for the Mobile that he could not be right. In answer to the tenth interrogatory, the pilot says, "When I came on deck the Fenix was 300 feet from the Mobile, just distance enough for the Fenix to have put about clear of us. There was not then time for the Mobile to have altered her course, and to have passed between the schooner and the Fenix." Then he states that the collision took place in the course of one minute after he came on deck; he will not swear that it was so long as a minute, it seemed almost immediate. Then he goes on to depose, "If I had not been compelled to leave the deck no collision would have taken place; I should have so altered the course of the Mobile, as to have

passed astern of the schooner and the Fenix." It is an important question, whether when the pilot came on deck the time for doing anything had not altogether passed, and the Mobile was in such a state that there was imminent danger of collision, if not almost certainty. Napier, on interrogatory, says, that when Birch came on deck it was impossible to alter the course of the Mobile so as to avoid the collision. If this evidence could be taken as altogether correct, several results would follow. First, the second mate was to blame for allowing the vessels to get into a position which brought on the collision—unless you should be of opinion that the sudden heaving-to of the schooner, being a circumstance which the second mate could not prevent, accounts for the state and condition in which the Mobile was placed. Again, if this evidence be true, of course Birch was right in porting his helm, and the Fenix was wrong in not porting her helm. But you must take the whole of this evidence into consideration, and say what you think ought to be the fair result of it. It is clear, as I conceive, from the whole of the evidence on behalf of the Mobile, that whilst Reilly was in charge of the vessel he never altered his course at all—he did nothing whatever; and it will be for you to say whether he ought not to have altered his course in some way or other. I am reluctant to occupy more time by entering minutely into the evidence, inasmuch as you will keep it in mind, and will carefully see how it bears on the questions which I am now about to submit to your consideration. The first question will be this,—whether, by the want of skill or promptitude of action on the part of the mate during Birch's absence from deck, the vessels were not brought into imminent danger of collision, or whether he is entirely excused by the schooner suddenly throwing herself into stays? Blame will attach if any steps ought to have been taken, because he did nothing. The second question will be—whether Birch was to blame or not at the last moment in ordering his helm to be ported? The last question will be—whether the Fenix was to blame for having kept on her course, she being on the starboard tack close-hauled? I agree with the learned Counsel for the Mobile, that if the Fenix had the power of avoiding this collision she ought not to have stood on ceremony, but to have starboarded or ported her helm according as the exigencies required. But whether she had that power depends upon time and circumstances. In order to ascertain that point, it must be remembered that Carter, the pilot, and all the witnesses on board the Fenix, say that there was not time or space so to do; and Major Priestley, who was on board the Mobile, is of that opinion also. Now, of course, this question mainly depends on

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When he came on deck, was there time to avoid collision?

Second mate whilst in charge did nothing.

Ought he to have done anything?

Was the pilot wrong in porting at last?

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the distance the ships were from each other when the *Fenix*, it is said, ought to have ported—whether the time, according to the pilot and Major Priestley, was sufficient for a brig of 290 tons, close-hauled on the starboard tack, to have gone about. Then, again, whether the people on board the *Fenix* could have heard the hailing—or whether they could have seen that the helm of the *Mobile* was ported. It is one thing for the people on board the *Mobile* to have ported their helm, and another thing for those on board the *Fenix* to have seen from the alteration of the vessel's course that this had been done.

Dr. *Addams*: Will the Court suggest whether it was not the duty of those on board the *Fenix*, in order to avoid this collision, to have taken some steps even before they were hailed at all?

The Court and the Elder Brethren having retired for consultation,—on their return,

*Mobile in
fault,*

DR. LUSHINGTON said :—The Trinity Masters are of opinion—and I entirely concur therein—First, that the second mate was to blame for not having in time adopted measures to avoid all risk of collision with either the schooner or the *Fenix*. Secondly, that when the pilot came on deck it was too late to take any safe measures. Thirdly, that no blame attaches to the *Fenix* in any respect whatever; and that it was not safe for her to have altered her course at any period of this transaction.

*Pilot not to
blame.*

Decree accordingly.

Rothery, proctor for the *Fenix*.

F. Clarkson for the *Mobile*.



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THE BRAZIL, J. M. HENRIQUES, *Master*.

Slaver—Association—Joint Capture.

In questions of joint capture, the *onus probandi* is on the claimant, and in favour of the actual captor. The rule, that no claim for joint capture can be established on the sole evidence of the crew claiming, is not so strict in slave cases as in prize of war. It appearing in the evidence that the surrender of the slaver took place before she was seen by the vessel claiming; such claim of joint capture held not to be established.

THIS was a question of joint capture of a slaver on the African coast promoted by the Commander of H. M. steam sloop Niger, against H. M. steam vessel Jackal the actual captor, and H. M. steam frigate Gladiator, whose captain was the senior officer of the division stationed in the Bights of Benin.

The allegation on behalf of the Niger stated, that the Jackal was attached as a tender to the Gladiator and manned from that vessel, and was frequently detached, cruising for and capturing vessels engaged in the slave trade. That, in November, 1850, the Niger and Jackal were cruising in the Bights of Benin, being there stationed, and associated for a common purpose, namely, the suppression of the traffic in slaves; the Niger having been directed to cruise from Lagos to Jaboo, and the Jackal from Lagos to Benin, the Niger's station being entirely included in that of the Jackal. That, at about 2.24 p.m. of 2nd November, 1850, a strange sail, which turned out to be the Brazil, was seen and reported from the mast head of the Niger, bearing about N. $\frac{1}{2}$ W. at which time the Niger had her head to the eastward, with a light breeze from the northward; whereupon her foretopsail was hoisted and foresail set for the purpose of wearing the ship and proceeding in chase; that shortly afterwards a steam vessel, namely, the Jackal, was seen, as if in chase of the said schooner, and in like manner reported: thereupon the Niger's foretopgallant sail and royal were set. That at this time it had been made out from on board the Niger that the schooner was becalmed with her head to the westward, and that the Jackal was bearing down on her starboard beam from the northward, and shortly afterwards that the Jackal had closed the schooner; that the Jackal was then perceived from the Niger going round the schooner in different directions, which she did for about a quarter of an hour, and then bearing up towards the Niger, as also did almost immediately afterwards the Brazil. That in the meantime, the Niger had set up the rigging of her main-topmast,

Allegation on
behalf of the
Niger.

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which had been struck for the purpose of examining the mast-head. Her main-royal-mast had been sent up, her top-gallant and royal-yards had been crossed, and all sail had been made on her mainmast, though her steam had not been got up, in consequence of its being apparent that, owing to the lightness of the wind, the schooner could not possibly escape from the Jackal, and the directions of the Admiralty were only to use her steam power, being a screw vessel, when absolutely necessary. That the actual capture of the Brazil, with her cargo of 279 slaves, was effected by the steam vessel Jackal, tender to H. M. S. Gladiator; but that such actual capture, as also the previous chase, were seen from the Niger, and the Niger herself was also in sight of and seen at such time from both the Jackal and the prize. That the Niger was co-operating and assisting the Jackal in the capture as aforesaid, and by her position blocked the escape of the prize out of the Bights, inasmuch as she bore S. $\frac{1}{2}$ E. from the prize, and vessels bound out of the Bights, are compelled by prevailing winds to steer a course from S. to S. by E. That the lieutenant in command of the Jackal came on board the Niger, and was informed of her commander's intention to claim as joint captor. That the lieutenant then mentioned three o'clock as the hour at which the capture had been effected, but afterwards signalled from the Jackal that it was half an hour earlier. That the Brazil was taken to Sierra Leone, condemned in the Vice-Admiralty Court there, and her slaves emancipated.

On this allegation the commander of the Niger and six others of her crew were examined.

Allegation on
behalf of the
Jackal.

The responsive allegation on behalf of the Jackal stated, that at about 11 a.m. of the said 2nd November, the Jackal was in latitude $4^{\circ}48'$ north, and longitude $3^{\circ}56'$ east, Lagos bearing from the said vessel about 102 miles north-west, when a vessel under bare poles was observed to the eastward, whereupon the Jackal made sail, got up her steam, and proceeded in chase of the said vessel, which had meantime hoisted all sail. That the Jackal continued in chase, and at 2 p.m. of the same day, having brought her within gun shot, one blank gun and four shot were fired at the said vessel, upon which she shortened sail, and hoisted a Brazilian ensign in token of surrender, and she laid to and surrendered, and at 2.30 p.m. was boarded and taken possession of and detained by the said lieutenant in command of the Jackal. That while in the act of boarding the Brazil, a strange sail, of which nothing more than her two masts were visible,

was observed from the mast-head of the Jackal, bearing S.E. That a prize crew was put on board the Brazil, with orders to follow the Jackal, which immediately proceeded in chase of the strange sail under full steam, but that it was not till about 4.30 p.m. that the Jackal was able to discover that the said chase was a man-of-war; whereupon, signals being exchanged, the course of the Niger, which till such time had been towards the northward and eastward, and in a direction leading from the Jackal and Brazil, was altered, and she stood towards the Jackal until the Niger and Jackal having closed, the said lieutenant went on board the Niger at about 5.45 p.m., at which time the Brazil was not visible from the paddle-boxes of the Jackal. That at 2.24 p.m. of the said 2nd November, the foretopmast of the Niger was on deck refitting, and that sail could not have been hoisted on it in less than four hours. That the Brazil was not becalmed while chased by the Jackal, and that the Niger did not in fact afford, and was not in a condition or position to have afforded, any assistance or co-operation in the capture; and that no claim was made on behalf of the Niger before the Vice-Admiralty Court at Sierra Leone.

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On this allegation the captain of the Gladiator, the lieutenant commanding the Jackal, and others of her crew, were examined.

The case was argued on the 4th and 5th December last, by *Deane* for the Jackal and by *Addams* for the Niger.

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DR. LUSHINGTON:—In considering what is the law applicable to the circumstances proved by the evidence in this case, I need not go into detail as to the principles which govern claims made by parties alleging themselves to be joint captors, or repeat that the *onus probandi* lies on the claimant, and that, in case of doubt, the law gives the preference to the actual captor. These are all well-known maxims which I need not again refer to, but it is necessary, for the sake of perspicuity, to state what is required to be proved in order to substantiate a claim of joint capture. The first rule is, that where the claim is founded upon being in sight, such claim must be proved by showing that the asserted joint captor was seen from the prize as well as by the captors. Lord Stowell, in the case of the *Melanie* (a), said—“By sight I understand the being seen by the prize as well as

Judgment.

Onus probandi
on the claim-
ant.

Asserted joint
captor must be
seen from the
prize; proof
thereof gene-
rally required
from other than
captors.

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Exception made where it is impracticable to obtain evidence from the prize.

Quere, whether the change in law as to interested witnesses has abrogated above rule.

by the captor. I am not aware that one of these will do without the other." Such being the definition of being in sight, the real question is, in what manner the so being in sight is to be proved, and what evidence, and of what kind, is necessary to constitute the proof which the law requires. The ancient rule was, that a claim to share as joint captor could not be maintained by the evidence of releasing witnesses alone, and such rule is laid down in a multitude of cases, which I need not cite. But exceptions have been engrafted on the rule. In the case of the *Galen* (a), Lord Stowell stated the rule, and at the same time expressed his opinion, that under the peculiar circumstances of that case, as the persons who were captured on board the prize had left the country, and could not therefore be examined, he thought it but right not to apply the strictness of the rule in that particular case. That, however, was a peculiar case, for the prize had been condemned to the Crown as taken prior to the commencement of hostilities, and the case was submitted to the judgment of the Court, under the directions of the Crown, which sought an opinion as to the parties entitled to share in the proportion intended to be given to the captors by the Crown. This case, though not strictly a precedent, shows that, in the judgment of Lord Stowell, there might be an exception to the general rule, that no claim for joint capture could be pronounced upon the evidence of releasing witnesses only; and it shows more, for it proves that the impracticability of obtaining witnesses from the prize is a just ground for the exception. Upon the present occasion, all the witnesses examined on behalf of the claimants are witnesses from on board their own ship. It is true that the witnesses, though interested, are, by the alteration of the law, no longer releasing witnesses, but that their testimony must be received notwithstanding their interest. But I am not disposed to rest the reception of these witnesses—or rather, perhaps, more strictly speaking, the effect to be given to their evidence—upon the altered state of the law; and for this reason, I am not prepared to say—though I do not decide the point—that the alteration of the law has abrogated the rule that a claim for joint capture should not be pronounced for upon the sole testimony of the witnesses from the ship of the claimants, for that rule was not founded upon a legal consideration of the admissibility of evidence. Releasing witnesses were as admissible then as all interested witnesses now are; but, as I apprehend, the rule was founded on the natural bias incident to all persons so circumstanced, and that is the same now as then. I do not, however,

(a) 2 Dod. p. 21.

decide that point, for I do not think that the circumstances of the case render it necessary so to do. This brings me to the consideration, whether the absence of witnesses from the captured ship is not accounted for, and that by the act of the captors, at least in part; whether that act was in itself right or wrong. It appears that this vessel was carried to Sierra Leone for adjudication. I know of no legal objection to a claim of joint capture being asserted, and prosecuted in the Vice-Admiralty Court there established; but though there may be no legal objection to such a proceeding, it is most probable that such a tribunal would not be convenient or satisfactory; and I do not think that the present claim ought to be prejudiced on account of no proceedings in assertion of it having been instituted at Sierra Leone. I must further say, that neither the master nor mate was taken to Sierra Leone. The instructions require that they should be carried to the place of adjudication. It may be that circumstances afforded a sufficient justification to the captors for not obeying such instructions; but however that may be, the omission to do so must not be allowed to prejudice a claimant to joint capture. The claimants could not, had they been disposed, have examined the chief witnesses from the captured ship. This state of things appears to me to bring this case within the scope of the observations I made in the case of the *Sociedade Felix* (a). Those observations are to this effect—that in the case of claims to share as joint captor in slave cases, the rules as to joint capture in war must not always be applied with the same strictness which is still to be observed in cases of ordinary prize. I have made these observations because I do not wish without necessity to decide whether the change in the law as to the reception of evidence has effected the rule that a claim of joint capture cannot be pronounced for on evidence from the claimants' ship alone. The time of the surrender, and what constitutes a surrender, are very important considerations when the claim is founded on being in sight at or before the capture. In the case of the *Rebecca* (b), Lord Stowell decided that the time of striking the colours is to be deemed the real *deditio*, and not the actual taking possession. Having made these remarks, I now proceed to the evidence in the case. I must consider how it bears on the question of sight, on the question of surrender, and whether any and what effect is to be given to the association between the vessels which has been pleaded.

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Absence of witnesses from prize accounted for in this case, and resulting from the act of the captors.

Distinction between slave and prize cases.

The learned judge then proceeded to examine with great Result of the evidence.

(a) 2 W. Rob. 159.

(b) 1 C. Rob. 233.

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Was the hoisting of the colours the signal of surrender?

The lowering of the sails undoubtedly was.

Pronounce against the claim of the Niger,

minuteness the statements of the respective witnesses on these points, the result of which, he said, was that the Brazil hoisted Brazilian colours soon after two o'clock, and before the time when the witnesses for the claimants depose she was seen from the Niger. This evidence, he observed, raises the question as to whether hoisting the Brazilian flag was a surrender, either taken singly by itself, or accompanied by the other facts stated. Now, in ordinary warfare, the striking of the colours is the *deditio*. It is sworn, however, by all the witnesses for the Jackal that the hoisting the colours in the slave trade is the signal of surrender, and there is no evidence to the contrary. No reason, however, is assigned for this being so. I have spared no pains to collect information on this very point, and I regret to say that though I have endeavoured to communicate with persons who have been in command of vessels upon this very station for a length of time, I have not been able to obtain any satisfactory information. However, it is remarkable that no reason is assigned for the hoisting of colours being considered a signal of surrender, and I do not like to be left to conjecture a reason, and still less to found my judgment upon any conjecture of my own; but this we all know, that the practice of vessels engaged in the slave trade is undoubtedly very peculiar. We know from our statutes, and the records of our Vice-Admiralty Courts, that such vessels frequently are not entitled to any national character, or to hoist any flag at all. It may be—I do not say it is—that the Brazilian flag is hoisted to denote that the ship wishes to be treated as a Brazilian; but however this may be, I must say the surrender in this case does not depend on the hoisting the Brazilian flag only—if it did, I should have considerable difficulty—but it depends upon the guns having been fired at her, upon her being within reach of the guns, and, above all, upon her lowering her sails. The lowering of the sails is one of those marks by which you always know that it is no longer intended either to resist the capture or to attempt to escape. I consider, then, that these circumstances, taken together, clearly prove the fact of surrender; and giving equal credit to both parties, the fact of surrender took place before the prize was seen from the Niger, and before the Niger was seen from the prize itself. I am of opinion, therefore, that the Niger has failed to establish her claim, and that the association cannot avail in this case. Therefore, I must pronounce that the Niger has failed to prove her case.

Deane, who appeared for the Jackal, prayed the Court to give the costs.

Addams, on the part of the Niger, submitted that the costs should be paid out of the proceeds.

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The COURT:—Most certainly not, and for an obvious and clear reason. I am sorry I am pressed for costs on the present occasion, but I see that the conduct of Lieutenant Bedingfield was seriously attacked, and imputations were levelled against him by Mr. Heath, who commanded the Niger. I see that an inquiry has taken place, and he has been acquitted. Notwithstanding that, I see that the interrogatories attack his character as a man and a gentleman; and as I am pressed for costs I and with costs. must give them.

Rothery, proctor for the Niger.

Poynter for the Jackal.



THE ARAMINTA, T. FERAN, *Master*.

Suit for Wages—Decree of Court—Payment before a Shipping Master—Proctor's Lien.

Payment to seamen by shipowners before a shipping master held to be no satisfaction of wages pronounced for in a suit in the Court of Admiralty. A proctor has the same lien for his costs, as an attorney has, on sums of money decreed by the Court to be paid.

THIS was originally a cause of subtraction of wages, promoted by four seamen against the owners of the *Araminta*. The cause was argued and judgment given on 17th March, 1854. The proctors, Pritchard and Son for the seamen, W. Rothery for the owners, not being able to agree as to the form of the minute in which the judge's decision should be entered, and the registrar having some doubt on the subject, the matter was submitted to the judge, and about the 12th April the registrar informed the proctors of the decision of the judge, and the minute was then entered as follows:—"The judge having maturely deliberated by interlocutory decree pronounced that Pritchard, jun., had sufficiently proved the contents of the libel by him given and admitted in this cause, and for the wages schedulate, save as to the deduction of 8*l.* 10*s.* mentioned in the said libel, and save as to the ten days double pay mentioned in the said libel and the said schedule, but made no order as to costs."

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Before this minute was settled, Pritchard applied to Rothery for payment of the balance of wages, for which the judge had, in substance, pronounced. Rothery answered that his clients, the owners of the *Araminta* at Liverpool, intended to make the payment to the seamen at that port before the shipping master, as they understood the Act of Parliament directed them to do. Pritchard gave notice to Rothery that he could not recognize any settlement of the wages in the suit unless made through him as the proctor of the seamen or otherwise directed by the Court. This notice was transmitted by Rothery to the owners at Liverpool; but they, on the 7th April, paid the wages to the seamen before the shipping master, and took the usual receipts and release. Pritchard, on being made aware of this, prayed, and the judge decreed, a monition against the owners to pay the sums pronounced for to Pritchard, as the proctor, and for the use of the said seamen. To this monition Rothery appeared for the owners. An act on petition was entered into, in which the owners relied on the payment made, as they contended, under the 13 & 14 Vict. c. 93, as a discharge of all obligations resulting from the decree of the Court. Pritchard asserted that the receipt of himself as the seamen's proctor would have been valid, and that the proctor has a lien for his costs on sums ordered to be paid by the Court.

The question was argued by the *Queen's Advocate* and *Spinks* for Pritchard, and by *Addams* for Rothery, in October, 1854; it was through a misapprehension on the part of the judge as to the wishes of the parties that his judgment was delayed to the present time.

Judgment.

Is payment of wages before shipping master in all cases compulsory?

DR. LUSHINGTON stated the facts as given above, and said:—

The first question is, whether the statute made it compulsory on the owners to pay the wages before the shipping master. The owners' construction of sects. 96, 97, 98 of 13 & 14 Vict. c. 93, is that any seaman of a foreign-going ship must necessarily in all cases be paid his wages before the shipping master, and that the release then and there given will operate as a settlement and in satisfaction of the decree of the Court. The 96th section directs generally, that seamen of foreign-going ships discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master. The 97th section requires the shipping master to decide any question which both parties agree to submit to him. Of course all disputes between seamen and owners, not so agreed to be submitted, are beyond the scope of this section. The 98th section enacts, that upon the comple-

tion before the shipping master of any discharge and settlement, a mutual release shall be given by the master or owner and the seamen; but I am of opinion that in this case there was no completion of any such discharge or settlement before the shipping master. The effect of the remainder of the section is limited by the first sentence, and applies to private payments in defeasance of these provisions of the statute. But it is said, if the owners elect to pay in that manner it satisfies the decree of the Admiralty Court. I am not of that opinion. I do not consider that the sections of the statute referred to have any application to wages which have become the subject-matter of a suit in this Court, and I must consider the question entirely apart from the statute. Something was said on behalf of the owners of notice having been given to the attorney of the seamen of their intention to pay before the shipping master; however that may have been, I never can consider notice to an attorney a notice to the proctor. Where parties have appeared before this Court by a proctor, such proctor is the only representative of those persons that the court can recognize. I am also of opinion that a proctor has the same lien as an attorney has in other Courts for costs of suit. Now the cases cited by Dr. Spinks are quite decisive as to the practice of other Courts (a). There seems nothing to set against these cases, and in seamen's wages the principle applies with greater stringency; they cannot be expected to be in a position to be personally liable for costs, so that they would be almost deprived of the benefit of professional assistance if the costs of the suit were not secured to the proctor or attorney on the wages recovered. I decree the owners to bring into the registry the sums scheduled, the bill of Pritchard and Son to be taxed as between proctor and client, and to be satisfied out of such sums, and I condemn the owners in the costs of this proceeding.

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Not when they have been the subject-matter of a suit.

Proctor only representative of the parties the Court can recognize, and has same lien for costs as an attorney in other Courts.

Pritchard and Son, proctors for the mariners.

W. Rothery for the owners.

[NOTE.—The 170th section of the Merchant Shipping Act of 1854 directs that, “in the case of all British foreign-going ships, in whatever part of her Majesty’s dominions the same are registered, all seamen discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master duly appointed under this Act, except in cases where some competent Court otherwise directs.”]

(a) *Read v. Duppa*, 6 T. R. 361; *Ormerod v. Tate*, 1 East, 464; *Wilkins v. Carmichael*, Doug. 104.

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March 14.

THE ROE, CHAPMAN, *Master.*

Salvage.

Where the crew of a vessel are much reduced by deaths or sickness, another vessel supplying the deficiency on the high seas from among her own crew is entitled to salvage.

THIS was an action brought by the master, owner, and twenty-seven of the crew of the *Abdalla* against the *Roe*, to obtain salvage compensation for services rendered to her under the following circumstances:—The *Roe*, bound from Benin for Liverpool with a cargo of palm oil, lost some of her crew from scurvy; others were also suffering from the same disorder. She hoisted a signal of distress, as asserted on the one side, but denied on the other, which was said to have been observed by the *Abdalla*, the vessel being then in the middle of the North Atlantic Ocean. The *Abdalla*, bound from Peru to Cork with a cargo of guano, bore down to her, and two of the crew volunteered their services to go on board and assist in working her home. The services were accepted, and both vessels reached their destination in safety. The value of the property salvaged was 9,350*l.* The owners of the *Roe* gave the two seamen, who had assisted to navigate the vessel home, 20*l.* each, but contested their liability to a claim by the master, owners, and the rest of the crew of the *Abdalla*, for salvage.

Deane appeared for the salvors.

Addams for the owners.

Judgment.

DR. LUSHINGTON:—The services in this case consisted in putting two men on board the *Roe*, where they remained seventeen days, and assisted in bringing her to a port of safety. Of course the vessel that performed the service was without the two men, and the parties are entitled to be rewarded. Looking at the value, I think 150*l.* will be a proper reward, with costs.

Subsequently this amount was, at the petition of the proctor for the salvors, apportioned as follows:—viz., 60*l.* to the owners, 25*l.* to the master, and the remainder amongst the

twenty-seven seamen of the Abdalla, rateably in proportion to their wages.

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Stokes, proctor for the Abdalla.

Nicholl for the Roe.

THE PEACE, F. J. NATT, *Master*.

Ship—Salvage—Practice.

A ship was arrested after discharge of cargo in a suit for salvage; bail was given for ship and freight: held, that the owners of the vessel proceeded against were bound to bring in an account of freight on oath, and to set forth when and the names of the parties by whom such freight had been paid.

THIS was a question of practice arising out of a cause of salvage. On 19th October, 1855, an action was entered by Rothery against the Peace, her cargo and freight, at the suit of the owners of the Brunette, and a warrant was extracted; but, as the cargo had been delivered, the vessel only was arrested; and, on the 26th October, Crosse appeared for the owners of the ship and gave bail for ship and freight, and brought in an affidavit as to the value of the barque. On the 6th November another action was entered against the Peace, her cargo and freight, at the suit of the master and crew of the Brunette; on the 14th, Crosse appeared to this action, and gave bail for the ship and freight, and the two actions were consolidated. On the 20th December, the judge pronounced 400*l.* to be due to Rothery's parties, for the salvage service rendered by them to the Peace, her cargo and freight, and condemned Crosse's parties and the bail given on their behalf, in so much of the said sum as the value of the Peace and her freight bears to the whole value of the property saved and in costs. There was no proof before the Court of the value of such freight and cargo, except that the cargo was alleged in Crosse's answer to have been about 3,000*l.*; the object of the motion was to obtain the names of the owners of the cargo, in order to extract a monition against them for their proportion of the salvage awarded.

Addams now moved the Court to assign Crosse to bring in an affidavit as to the amount of freight paid to Crosse's parties by or on behalf of the owners of the cargo; and when and by whom and on whose account, as owners of the cargo, the same had been paid.

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Deane opposed this motion on behalf of *Crosse's* parties, contending that no freight had become due at the time the salvage service was rendered.

Judgment.

DR. LUSHINGTON overruled *Crosse's* objection and assigned him to bring in an account of freight on oath, and specification of names of the owners of the cargo as prayed.

Rothery, proctor for the salvors.

Crosse for the owners.

THE NYMPH, F. M. FENENGA, *Master*.

Master's Suit for Wages—Responsive Allegation—Liability of Purchasers.

The purchaser of a ship takes her with the liabilities attached by law—seamen's wages—bottomry bond—demand for salvage; and his remedy must be against the vendor.

March 18.

THIS was a suit promoted by Fenenga, the late master of the vessel, for wages. The action was entered in the sum of 54*l.* 15*s.* 2*d.* The petition given in by the master claimed wages due for service on board the said vessel, then the *Twee Gezusten*, from 10th February, 1854, to the 28th of April, 1855, when she passed into other hands at Cardiff, and when he was discharged by the present owners or their agent. The allegation on behalf of Richard and Henry Burton, the present owners, asserted a settlement of accounts and wages to have been made at Cardiff, between Jong, the former owner of the *Nymph*, and Fenenga, the master. This was admitted without opposition. The present question was on the admission of a responsive allegation on behalf of the master, counterpleading the settlement of accounts asserted to have been made at Cardiff between Jong and himself, and explaining his connection and dealings with Jong.

Addams appeared in opposition to the allegation.

Bayford in support of its admissibility.

Judgment.

DR. LUSHINGTON:—It appears to me that the objection pressed by Dr. Addams, as to the amount at which the action is en-

tered, cannot be sustained—certainly not in this stage of the case, because the action being entered at above 50*l.*, I cannot enter into a preliminary investigation as to whether this may not be reduced to a smaller sum in the further proceedings in the case. I must presume that the action having been entered for above 50*l.*, 50*l.* might be recovered; therefore I give no opinion as to the statute which imposes upon the Court the duty of not entertaining a suit by a mariner where the sum does not exceed 50*l.* With regard to this case, it ought to be remembered that those who purchase ships stand in a different position from those who purchase other articles; for where a man purchases a ship he takes it with all the liabilities that attach to it in law, and if he would protect himself against those liabilities, he must do so by a guarantee, or by some other mode, that he may not be injured by latent demands. If the ship be sold, she is always subject to any demand for seamen's wages for any period of time during which the law allows a suit to be brought. She is subject to a bottomry bond, and to a demand for salvage; therefore it becomes the duty of those who purchase ships to take care with whom they deal. There can be no doubt whatever, that if a purchaser takes a vessel as free from liabilities, and liabilities attach to her, he has a remedy against the vendor; and it cannot be considered a case of hardship, when he knows what the law demands, and what he needs for his protection. This is a demand for wages. The summary petition is brief enough, and sets forth only the facts on which a summary petition is generally founded. In answer to that a long allegation has been given in, of which the Court has no reason to complain. The substance of it is—not to enter into particulars—that there had been a settlement with the master; that the master had been fully paid the whole of his demands against the ship; that he voluntarily gave up possession of her, free of all demands on his part—in other words, that if he had other demands on the ship by the law of Holland or the law of England, he waived them, and the parties are entitled to say that he cannot proceed against the ship. That allegation was admitted without opposition, and it is certainly competent to the master to contradict all the main averments in that plea. It appears to me—having looked at this allegation with considerable attention—that the master was entitled to plead these facts, because the substance of the plea is that he never had received payment at all. So that his statement is, “I never have received payment at all; all your statements as to my having received payment are erroneous in point of fact. It is true bills of exchange were offered to me at various times, but it is also true that I rejected

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March 18.

The purchaser
of a vessel
takes it with
all its liabilities,

and his remedy
is against the
vendor.

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those bills of exchange as being utterly worthless. With regard to my voluntarily giving you up my claims upon the ship, I was placed in this situation: you put two police officers to watch me for several days, you threatened me with proceedings, you called in the intervention of the police if I did not give up the ship, and therefore I was compelled most reluctantly, in consequence of all these circumstances combined, to give up possession." Now, giving up possession of the ship is not ceding a demand against the ship; it does not affect the law or justice of the case. With the alterations I have suggested in the course of the argument in the 7th article, and in the article that pleads a subscription for the benefit of the master, this allegation must be admitted to proof.

Bayford, proctor for the master.

Ring for the owners.

THE VIVID, J. WATSON, *Master*.

Collision—Collier at Anchor—Mail Steamer—Rate of Steaming—Lights.

Neglect of the Admiralty regulations, as to placing light at mast-head, will not prevent a vessel from recovering, unless it appears that the collision was occasioned by such neglect.

It is no excuse for a vessel steaming at the rate of twelve knots, on a dark night, through a fairway, where vessels are accustomed to anchor, that she was under contract to carry Government mails at the rate of thirteen knots.

April 17.

THIS was a suit promoted by the late brigantine *Henry*, of the burthen of eighty-nine tons, against the steam-vessel *Vivid*, to recover for a total loss, occasioned by a collision between them, at 11:30 P.M., on the 11th August last, in Dover Roads. The brigantine, coal laden, was bound from Newcastle to Rouen, and had brought up opposite to the entrance to Dover Harbour. According to her account, she immediately hoisted a signal lantern under the boom of the foresail, about four feet on the starboard side of the foremast and about twenty feet above the bulwarks. There was also a bright fire in an open caboose in the galley. The night, although dark, was clear. The steamer, of the burthen of 300 tons, with engines of 120-horse power, carrying the mails from Dover to Calais, was seen rapidly approaching, and was instantly hailed, but no notice was taken, and the steamer struck the brigantine with such violence that she

filled, and the master, mate, and a boy were drowned. The steamer, as alleged, was proceeding at the rate of twelve miles an hour. The steamer pleaded in her defence that she was under a contract with her Majesty's Government to convey the mails at the rate of thirteen miles an hour; that at the time in question she saw almost under her bows a dark object, whereupon the master called out, "Hard aport," two or three times, "Ease her," "Stop her," and "Turn her astern;" but, notwithstanding such orders were instantly obeyed, she ran into the brigantine. She contended that anterior to, and at the time of the collision, the brigantine had no light exhibited so as to be visible to any one on board the steamer, and that if she had a light, it was not suspended in accordance with the Admiralty regulations.

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Jenner and *Bayford* were heard for the brigantine.

Haggard and *Robertson* for the steamer.

The Court was assisted by Captain *Weller* and Captain *Pigott*.

DR. LUSHINGTON, addressing the Elder Brethren, said:— Judgment.
Gentlemen, you are so entirely masters of the evidence in this case, and have paid so much attention to the arguments of counsel, that I shall not trespass upon your time further than my duty imperatively requires me to do. I shall merely call your attention to the questions which you will have to determine, and to the bearing of the law on those questions. The collision took place on the 11th of August last, and was attended not merely with loss of property, but a melancholy loss of life; and the question which we have now to discuss is, which of the parties were to blame for this collision?—for it is not a case of inevitable accident. On the part of the brigantine it is alleged that the collision was entirely owing to the want of a good look-out, or other the default of those in charge of the steam-vessel—for that, at the time thereof, the light, so as aforesaid suspended to the boom of the foresail of the brigantine, and the fire in the galley, were burning brightly, and were distinctly visible from the steamer, and, if a good look-out had been kept, might have been seen by the crew of the steamer at a sufficient distance to have enabled the steamer to alter her course and so avoid the collision. In answer thereto it is pleaded on behalf of the Vivid in the following words:—"The collision was occasioned by the brigantine having been brought up, or permitted to drive to and in the fairway of vessels leaving Dover Harbour for Calais, it being well known that the steam-packets run with the mails

Collision not
the result of
inevitable
accident.

Case of the
brigantine.

Case of the
steamer.

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Was the brigantine anchored in a proper place ?

There can be no doubt that there was a light hoisted on board the brigantine.

Was it in a proper place ?

between Dover and Calais and Dover and Ostend by night, and otherwise by the want of caution or neglect on the part of those on board the brigantine, in not showing a proper light, in accordance with the Admiralty regulations ; and that the collision was not imputable to the steamer." Now it appears that the brigantine was a vessel heavily laden with coals, and about nine o'clock on the evening of the 11th of August she came to anchor in the neighbourhood of Dover. It will be for you to consider whether that was a proper place for anchorage or not. According to the evidence it appears to have been a place in which a vast number of vessels were accustomed to anchor. It is said, on the other hand, it was in a fairway—and I presume, from the whole of the evidence, that it was. Whether or not it is a just cause of blame to bring up in an anchorage ground, which is also a fairway, is a question for your consideration. The vessel being so anchored, the next question that arises is, whether any light at all was hoisted on board the brigantine ? Of that I think there can be no doubt ; indeed, it is not denied by the owners of the Vivid that there was a light at one period, though it is said it was not burning at the time in question. We must therefore direct our attention to that. How does the evidence stand ? One witness swears that it was actually burning, and we have an affidavit from two or three persons on shore that at half-past eleven o'clock they actually saw this light. There is also the evidence of other witnesses to the same effect. You have it in evidence that the light was properly trimmed, and therefore the ordinary presumption, and the presumption of law is that, if nothing particular occurred to the contrary, the light continued to burn. This being so, you will have to take into your consideration what I think is by far the most important question on the present occasion, that is, how the light was placed. Its position is described by those on board the brigantine in the following words. It was a signal-lantern made of glass, and was lighted and trimmed with a sufficient length of wick and the proper quantity of oil, and was hung up under the boom of the foresail, about four feet on the starboard side of the foremast, and about twenty feet above the bulwarks of the brigantine. If it should turn out that the light so hoisted was not in so advantageous a position as if it had been at the mast-head, then that will account for the evidence given by various persons on board the Vivid that they did not see it. You will have to consider and compare the evidence as to the exhibition of the light, and the negative evidence by persons that it was not seen, and you will take that into account with the probabilities of the case to which I am about to direct your attention.

It is admitted that the regulation of the Admiralty has not been complied with. The regulation is, "that all sailing vessels at anchor in roadsteads or fairways shall be bound to exhibit, between sunset and sunrise, a constant bright light at the mast-head, except within harbours or other places where regulations for other lights for ships are legally established. The lantern to be used when at anchor, both by steam-vessels and sailing-vessels, is to be so constructed as to show a clear good light all round the horizon." Now that condition has not been complied with: and then arises the point which was so much discussed in the case of the *Telegraph*, namely, what is the effect of non-compliance with the Admiralty directions. If nothing had been said in the Act of Parliament except simply that such lights should be hoisted according to the directions of the Admiralty, it would have been impossible for any man to maintain a suit here who had disregarded compliance with them; but the consequence would have been this, that if a vessel had neglected to hoist a light on a bright moonlight night, and another vessel had run her down, she could not have recovered—therefore the legislature guarded against that by another section in the Act of Parliament. The legislature in effect has said this—you shall not be estopped from bringing your action merely in consequence of a breach of the rules of the Admiralty, but if it be shown that the collision was occasioned by the non-observance of the rule, then you shall be estopped. Therefore the question might arise, was the collision occasioned by the non-observance of the rule? In the case of the *Telegraph* (a), when I addressed the Elder Brethren I took care to point out what I considered the true meaning of the statute, and it appears that the Judicial Committee entirely concurred in the view I took on that point. Sir John Patteson, who delivered the judgment in that case, said—"It is perfectly clear, therefore, that if the regulations which are put forth by the Commissioners of the Admiralty are not literally complied with, and any collision takes place and damage occurs which is attributable to a departure from the regulations, and not justifiable under the circumstances, the party who so departed from the regulations cannot recover." Then referring to the address I had made to the Elder Brethren upon that occasion, he said:—"It is most fairly and properly put in the address by the learned Judge to the Trinity Masters in these words, whether you are of opinion that the omitting to hoist a light at the masthead was the occasion of this collision? The learned Judge"—that is, myself—"goes on to say the solution

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Admiralty
regulation
not complied
with.

What is the
effect of such
non-com-
pliance?

Plaintiff not
barred, unless
collision was
occasioned
thereby.

Case of the
Telegraph.

(a) 8 Moore, P. C. 167.

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of this question must depend on considerations which particularly belong to you as relates to this particular case, because you are best capable of judging whether this vessel, the *Telegraph*, proceeding from the port of Belfast, would be able to descry a vessel with the same facility with a light hoisted in the larboard mizen-rigging as she would if it had been at the masthead. If you are of opinion she would not, then I cannot help thinking that this collision might have been avoided by hoisting a light at the masthead; and it is fairly to be inferred that the collision was occasioned in consequence of its not having been so hoisted." Now I think I put it pretty strongly to the Trinity Masters on that occasion; and Sir John Patteson says—"We think the inference is very fair, and very right, and very proper, because there being express regulations of the Admiralty that the light shall be hoisted at the masthead, if parties without justifiable authority depart from the regulations, and put a light elsewhere, it ought to be at their own risk." Then he goes on—"Now, as admitted in argument, it is not departure from the regulations which would preclude a vessel from recovering altogether, unless that was the occasion of the collision. It might be a light night, so that a vessel could be seen without a light, or there might be misconduct on the part of the other vessel: and in these, and a hundred other cases that might be put, the party would be entitled to recover, although the regulations had not been complied with. Clearly the collision must be traced to a departure from the regulations." I think I cannot better discharge my duty to you than by putting the question exactly in the same way as I put it on a former occasion, and exactly in conformity with the judgment delivered by Sir John Patteson, that is,—if you are of opinion that the light being placed, as I have already stated, under the boom of the foresail, about four feet on the starboard side of the foremast, and about twenty feet above the bulwarks, was less visible than if it had been hoisted at the masthead, then it is impossible that these parties can recover;—but if you should be of opinion, on the contrary, that, though the regulations of the Admiralty have been departed from, it was from the place, where it was suspended, just as visible to any vessel approaching from the port of Dover, then the law says, that if the collision arose from the fault of the other vessel, the brigantine shall not be estopped from recovering by reason of having neglected to comply with the Admiralty regulations. I now come to consider the conduct of the steamer. She was in the Government employ, and was under a contract to steam thirteen knots an hour. I have had occasion to say over and over again, that it

Was the light as visible as if placed, in conformity with Admiralty regulations, at the mast head?

Steamer under a government contract does not relieve the owners of responsibility.

does not matter what the contract is with the Government—that does not take away the responsibility of the parties. That was the doctrine laid down by Lord Ellenborough. Despite of the ingenious argument of Dr. Robertson, it appears from the evidence that the Vivid was proceeding at the rate of twelve knots an hour, the night being intensely dark, and was going through a fairway where vessels were accustomed to anchor.

The next point is, are you of opinion, under these circumstances, that this collision might have been avoided, and the light seen if there had been a good look-out? Captain Watson was on the bridge, and it appears that there were two persons on the look-out—one stationed on the starboard, and the other on the larboard bow; and it is also said, that there were a number of passengers who were likely to have seen the vessel. Taking all these circumstances into consideration, you will have to determine the question which I have put to you. Was the collision occasioned by the absence of a light altogether, or by showing a defective light, on board the Henry? Or, was it occasioned by the darkness of the night, or the rate of speed at which the steamer was going, and the absence of a good look-out?

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Was there a good look out on board the steamer?

DR. LUSHINGTON, after conferring with the Elder Brethren, said:—The gentlemen, with whose assistance I have been favoured, are of opinion that the brigantine had a suitable light hoisted, and was not in an improper anchorage; that the exhibition of the light on board the brigantine, as proved by the evidence, was as visible to the steamer so approaching her as if it had been hoisted at the masthead; that the collision was not occasioned by the departure from the rule of the Admiralty; and that no blame attaches to her. They are of opinion that the blame of this collision attaches to the steamer, and I think so too (a).

Light as visible as if placed at masthead.

Collision not occasioned by departure from Admiralty regulation.

No blame to brigantine.

Steamer wholly to blame.

Jenner, proctor for the Henry.

Glennie for the Vivid.

(a) This judgment was, on the 7th of July following, affirmed on appeal to the Judicial Committee of the Privy

Council, but without costs to either party.



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THE BORUSSIA, G. M. CHRISTIANSEN, *Master.*

Towing Vessel at Night from Dock to Dock.

Held, to be a want of due caution to move, by means of a steam-tug, a ship from one dock to another, at night-time. Under such circumstances, a pilot on board the ship being towed has no such charge or control over her movements as to exculpate the owners.

THIS was a proceeding for damage arising from collision, brought by the owners of the barque *Therese*, against the steamship *Borussia*, both foreign vessels. The *Therese*, of the burden of 430 tons English, laden with coal, came to an anchorage in Hull-roads on the 14th November, in last year, according to her own account, about 500 fathoms from the shore. On the evening of the 15th, about nine o'clock, she was lying at the same anchorage, with a flood tide flowing westward, her head to the east, the Victoria Dock-basin of Kingston-on-Hull bearing about N.E. She had a clear horn lanthorn suspended outside the main rigging on her port side, about twelve feet above the bulwark rail, with a composition candle in it burning brightly, and a glass lanthorn with two oil lamps in it suspended from the peak of the mizen-gaff, and she pleaded that she kept a good look-out. The *Borussia* was towed by a tug from the Victoria Dock above mentioned, in order to be taken to the Humber Dock-basin, a short distance higher up the river, both docks being on the north bank. She was not herself under steam; she had a duly licensed Humber pilot on board, who was examined *viva voce*, and stated in his evidence that he did not, on such occasions, consider himself responsible for the movements of the ship over which he had no control, those on board the tug having the full management; for such a job as shifting from one dock to another he received five shillings; the tug towed the *Borussia* south from the Victoria Dock for about 200 or 300 yards, and as they were coming round to the westward the master and engineer of the tug suddenly saw a light ahead, distant about three ships'-lengths, and immediately called out to the *Borussia*, "Hard aport on board the steamer," and tried to pass to the northward of the ship on which the light appeared, but that immediately afterwards the *Borussia* struck the jib-boom of the *Therese* with her larboard side amidships, carrying away the jib-boom, swung round, and fell alongside the *Therese's* port side; the damage done was but trifling.

Addams and *Spinks* appeared for the barque.

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Jenner and *Deane* for the steamer.

The Court was assisted by Captains *Redman* and *Drew*.

DR. LUSHINGTON, after stating the facts of the case to the Trinity Masters, by whom he was assisted, said;—it was endeavoured, in the examination of the pilot, to elicit that the anchorage of the *Therese* had been shifted after she first took it up. But we cannot now go into that; it was not pleaded on behalf of the *Borussia*, and it is distinctly asserted on behalf of the *Therese*, that her anchorage was not shifted. As regards that, the only question for you will be whether the *Therese*, at the time of the collision, was in a safe and proper anchorage? As regards the *Borussia*, it will be a question whether it was expedient to move such a vessel by means of a steam-tug at night, in anything like thick weather? She was in charge of a pilot; but it is not pretended that his presence can excuse the master from his responsibility; the circumstances are quite different from those of a vessel in tow of a steam-tug in broad daylight, where the tug ought to obey the orders of the pilot. Did the collision arise from want of a sufficient look-out on board the tug, or from want of sufficient lights on board the *Therese*? It must be remembered that these are foreign ships in an English harbour: if the collision was occasioned from the lights on the *Therese* being so placed as not to be sufficiently visible to those on board the tug and the *Borussia*, the *Therese* cannot recover; but their merely not being in accordance with the Admiralty regulations would not hinder her from recovering.

Judgment.

Was it proper to move the *Borussia* at night, and in thick weather?

or was the collision occasioned by the lights of the *Therese* not being properly placed.

After consulting, the Court was of opinion that it was exceedingly imprudent so to move the *Borussia* at night; that the lights on board the *Therese* were not properly placed, but that they did not, in fact, deceive those on board the tug or the *Borussia*, and that therefore the latter vessel was to blame for the collision.

Borussia solely to blame.

Coote, proctor for the *Therese*.

Jenner for the *Borussia*.



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April 19.THE ZOLLVEREIN, C. H. FANICHEN, *Master.**Collision on High Seas between a British and Foreign Vessel—
The former not bound by Statute.*

A foreigner cannot set up against a British vessel with which she has been in collision the British vessel's violation of British statute law on the high seas, for the foreigner could not herself be bound by it, as it is beyond the power of the legislature to make rules applicable to foreign vessels beyond British waters. The rights and merits of a case may be governed by a different law from that applicable to the form of remedy and procedure.

THIS was a cause of damage from collision, brought by the owners of the English brig *Pet* against the Prussian brig *Zollverein*. At about half-past 3 a.m., on November 12, the *Pet* was off Flamborough-head, at a distance of seven or eight miles, close-hauled on the port tack beating to the southward, wind from S.S.W. The *Zollverein* running north before the wind came in collision stem on with the port-bow of the *Pet*, which latter vessel was sunk; the *Pet* had kept her course and showed a light; the *Zollverein* was running in company with another brig close on her starboard side; when the latter brig ported and sheered off to the eastward, the *Zollverein* found herself close upon the *Pet*, and, though she then ported her helm, the collision ensued.

The case as regards the facts of the collision was argued on April 19, before Trinity Masters (a), by *Addams* and *Twiss* for the *Pet*, the English vessel proceeding, by the *Queen's Advocate* and *Deane* for the *Zollverein*, who contended that, whatever might be the liability of the *Zollverein*, the *Pet* was precluded from recovering under sects. 296, 298 of the Merchant Shipping Act, the 296th section of which points out what steps vessels are to take when meeting each other, and any risk of collision arises; the 298th provides that "if in any case of collision it appears to the Court, before which the case is tried, that such collision was occasioned by the non-observance of any rule," &c., "the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the Court, that the circumstances of the case made a departure from the rule necessary."

Was the English vessel precluded by the Act from recovering?

(a) Captains *Redman* and *Drew*.

DR. LUSHINGTON gave the result of his consultation with the Trinity Masters in the following words:—" I first requested the opinion of the gentlemen by whom I am assisted, as to the Zollverein, and they are of opinion, 1st. That the Zollverein was to blame for this collision in having continued to sail too close to the other light vessel, and so occasioned the light of the Pet to be obscured; in consequence the Zollverein's helm was ported too late to avoid the collision. 2ndly. With respect to the Pet they are of opinion there were no circumstances in this case to render a departure from the rule laid down in the Act of Parliament necessary to avoid immediate danger. 3rdly. They think that the collision might have been avoided by porting the helm of the Pet, as there was ample time to have done, as appears by the statement in the fourth article on the part of the Pet, which states the distance to have been a quarter of a mile; and by the evidence of the mate, who says that the Zollverein was seen six or seven minutes before the collision; to this it must be added that if there had been no Act of Parliament the Pet would have been justified in keeping her course and in not porting. It is a very important question to determine whether, in the case of two vessels coming into collision on the high seas, the one being a British ship and the other a foreigner, all the provisions of the Act of Parliament apply to the British vessel. To a foreigner I apprehend they cannot; and so, if they apply to the one and not to the other, I do not say there is, but I throw it out there may be, a degree of injustice to a British vessel so placed in that position."

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Opinions of
Trinity Mas-
ters on the
facts.

Question of
law arising
thereout.

This issue of law on the above facts was argued on 25th April, by the same counsel.

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Judgment.

DR. LUSHINGTON said:—The question is, whether the Mercantile Marine Act can affect a British vessel which has been in collision with a foreign vessel on the high seas, the former being the party proceeding in the suit? Supposing an English vessel to sue a foreign vessel in this Court, could the foreigner be held bound by the rule of porting the helm? I have long anticipated that this question would arise, and have given it my frequent and most deliberate consideration. The whole question is not without its obscurity and difficulty, but after the full attention I have before given to the point, I shall not hesitate to pronounce my judgment at once. The only facts of the case we need keep before us now are that the party proceeding is the owner of a British vessel; that she was close-hauled on the port tack and kept her course; that the vessel

The British
vessel was
close-hauled
on port tack,
the foreigner
was going free.

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The Pet violated Act by not porting.

Does the Act apply to her?

Distinction between "rights and remedies."

Power of the British legislature extends to foreigners only when within our own jurisdiction.

with which she came in collision was a foreigner, running with the wind free. I was exceedingly careful to put down in writing what the Trinity Masters thought as to the facts. Now if the case had rested at the end of the first paragraph of the Trinity Masters' finding, the Pet of course would have recovered. In the third paragraph the Trinity Masters did not use the word "occasioned," of the 298th section of the Act. I did not so word the question to them, because it seemed to me to be rather a consequence to be drawn by law than to be given by the verdict of the Trinity Masters. If I were to decide this case without reference to the Mercantile Marine Act, I am clearly of opinion that the Pet would recover; but it appears that the Pet has violated the Act of Parliament, and falls within the meaning of the terms "such collision was occasioned," if the Act applies at all. Does the Act apply?—The principle which governs all these questions of jurisdiction and remedies is admirably stated by Mr. Justice Story, *Conflict of Laws*, c. 14. "In regard to the rights and merits involved in actions, the law of the place where they originated is to be followed; but the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right or the country of the act." (a) Now does section 296 relate to the merits and rights of the case, or to the remedy and order of judicial proceeding? Section 298 certainly relates to remedies, but cannot come into force except as founded on section 296. In endeavouring to put a construction on a statute, it must be borne in mind how far the power of the British legislature extends, for unless the words are so clear that a contrary construction can in no way be avoided, I must presume that the legislature did not intend to go beyond this power. The laws of Great Britain affect her own subjects everywhere—foreigners only when within her own jurisdiction. Attempts have been made, as in trying to enforce custom's laws, to bind foreigners out of our own jurisdiction, and great inconvenience has resulted therefrom. As to the statute itself, then, does it, so far as regards the merits and rights, attach to the Zollverein at the time of the collision; and, if it does not, can the Zollverein plead it as against the British ship? The words of the sections are in themselves ample, but they must be limited by the general limits of the power of the legislature. Dr. Twiss's observations also on the effect of the introductory section of this fourth part of the Act,

(a) Cited in *General Steam Navigation Company v. Guillon*, 11 M. & W. 877; see also Lord Brougham's

judgment in *Don v. Lippmann*, 5 Cl. & Finn. 1.

seem to me of consequence: it provides that the fourth part of this Act shall apply to all British ships and foreign steam-ships as there limited, so that the general term ship in the 296th section must be understood of such ships only as the 291st section declares this fourth part applicable to; but this will not be the main ground of my judgment. Generally, when a collision takes place between a British and foreign vessel on the high seas, what law shall a Court of Admiralty follow? As regards the foreign ship, for her owner cannot be supposed to know or to be bound by the municipal law of this country, the case must be decided by the law maritime, by those rules of navigation which usually prevail among nations navigating the seas where the collision takes place; if the foreigner comes before the tribunals of this country, the remedy and form of proceeding must be according to the *lex fori*. But I am of opinion that in its true meaning the 296th section is wholly applicable to the merits of the case; it determines how vessels shall conduct themselves at the time of collision on the high seas; the legislature of this country has no power to bind foreign vessels in such a condition. It is true that the 298th section relates to remedy, but the application of the section is entirely founded on and emanates from the 296th. Then comes the question, whether, in a trial of the merits of a collision, a foreigner may urge in his defence that the British vessel, though free by the law maritime, has violated her own municipal law, and so, being plaintiff, cannot recover? Reverse the position: suppose the foreigner plaintiff, and to have done his duty by the law maritime. I am clear that he must recover for the damage done; if so, it is contrary to equity to say that the British shipowner, *in eadem conditione*, shall not recover against the foreigner. What right can the foreigner have to put forward British statute law, to which he is not amenable so far as the merits are concerned? It has been suggested that a British vessel sailing by night cannot always be certain whether a vessel, with which there is the risk of collision, is a foreigner or not, and that permitting a different line of conduct according to this circumstance, would encourage neglect of the Act; but I cannot give much weight to such remote consequences. I pronounce for the damage proceeded for by the *Pet* against the *Zollverein*.

F. Clarkson, proctor for the *Pet*.

Deacon for the *Zollverein*.

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As between a British and foreign ship on the high seas, the general maritime law must be the rule of the Court.

And in such a case British ship not bound by her own municipal law.

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THE ILOS, STANTON, *Master.*

ON MOTION.

Ship—Damage—Action not entered in Name of Registered Owner—Claim of Defendants, to be dismissed after Damage pronounced for and the Accounts referred, not admitted.

THIS was a case of damage, in which an action was entered in December, 1854, by Clarkson, on behalf of Richard Redway, alleged to be the owner of the schooner Jane Archibald, against the barque Ilos. An appearance was given by Tebbs for the owners of the Ilos, and in October, 1855, the Court pronounced for the damage, and condemned Tebb's parties and their bail in such damage, and ordered a reference to the registrar and merchants as to the amount. When the parties came before the registrar and merchants, Tebbs objected to the reference being proceeded with, asserting that he had that morning become aware that George Tanner was the registered owner of the Jane Archibald, and not Richard Redway, in whose behalf the action had been entered; and that at the date of the collision in question, at the time the action was entered, and at the date of the interlocutory decree, George Tanner was the sole registered owner of the Jane Archibald; the reference was accordingly adjourned, and the parties entered into an act on petition, and Tebbs now prayed the Judge to dismiss his parties, the owners of the Ilos, from all further observance of justice of the suit.

Clarkson admitted, that till a late period the name of George Tanner had appeared as the sole registered owner, but that in fact Richard Redway was under a bill of sale the beneficial owner; and that, as Tebbs had appeared absolutely for the owners of the Ilos, who had been found wrongdoers by a decree of the Court, he could not now claim to be dismissed on the ground of the action not having been entered in the name of the then registered owner.

Robinson for Tebbs' parties.

Bayford contra.

Judgment.

DR. LUSHINGTON rejected the motion, directed the reference to be proceeded with, but stated that if after the damage had

been ascertained, any doubt arose as to who was entitled to receive it, he should direct the amount to be paid into the registry, and throw upon the party claiming it the onus of establishing his ownership.

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F. Clarkson, proctor for the Jane Archibald.

Tebbs for the Ilos.

THE UNITY, B. WARD, *Master*.

Collision—Steamer and Sloop in Tow of Steam-Tug—Custom of the Tyne—Sects. 297, 298 of Merchant Shipping Act.

A steamer going down the Tyne, at night, just to the southward of mid-channel, saw the light of one steam-tug on her port-bow, and the light of another nearly ahead but a little on her starboard-bow. She kept her course, intending to pass between them, till she discovered a sloop just on her port-bow in tow of latter tug, she then ported her helm, to pass between the tug and the sloop, and came into collision with the sloop. Held to be in fault, for not having ported when she first saw the light of the tug; the sloop was also held to blame for not having shown a light. On a suggestion on behalf of the tug, which was on the port side of mid-channel, of a custom in the Tyne for light-draughted vessels going up to keep to the south side, contrary to the rule of the statute; held, that no such custom could be maintained, unless an actual local impediment or extraordinary difficulty could be proved.

THE Neptune, a steam-vessel of the burthen of 173 tons, with two engines of 50-horse power each, and the Unity, a sloop of the burthen of 56 tons, came into collision with each other at 5.15 p.m. on the 10th of November last, in the River Tyne, between the lights of North Shields and the bar. The steamer was proceeding from Newcastle to Hull with passengers and a general cargo; the sloop, laden with iron, was in tow of a steam tug, and was bound from London for Newcastle. On behalf of the steamer it was alleged that the night was dark and hazy, but fine, and that she was proceeding at half-speed; that when opposite the Warping Buoy, as near to the south side as was safe for her, she observed two steam-tugs, one of which was slightly on her starboard, and the other on her port bow, and she continued her course, intending to pass between them; that when the former was distant about a ship's length, the Unity was, for the first time, seen a little on her port bow; that the Neptune ported her helm to pass between the sloop and the tug, and then discovered that the tug had the sloop in tow; that the tug, instead of slackening her speed, so as to allow the Neptune to pass

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clear over the tow-rope, continued her course, and the Unity not having altered her helm, and being towed across the hawse of the Neptune, came into her larboard flange, thereby doing her considerable damage. She also charged the Unity with violating the Admiralty regulations by not carrying a light. On behalf of the sloop it was averred that the weather was fine, and the night was not so dark but that vessels could be seen at the distance of a quarter of a mile. It was said that the Neptune was proceeding considerably faster than half-speed; that when she neared the steam-tug with the sloop in tow she suddenly put and kept her helm to port, and, without stopping or easing her engines, threw herself athwart the tow-rope, whereby she rendered the collision inevitable. The sloop ported her helm to lessen the force of the blow, but the steamer cut her down to the water's edge. Cross actions were entered by the respective parties.

Twiss and *Spinks* were heard for the Neptune.

Addams and *Robertson* for the Unity.

The Court was assisted by Captain *Pixley* and Captain *Pelly*.

Judgment.

DR. LUSHINGTON, addressing the Elder Brethren, said:—Gentlemen, it will be a part of my duty to put to you several questions relating to this collision. I will preface them by a few observations. In entering upon this inquiry, let us first endeavour to fix, if we can, the precise place at which the collision occurred. According to the statement on behalf of the Neptune it was in the River Tyne, between the lights of North Shields and the bar. That is rather a vague statement, consequently it will be more safe if we take the specific statement made by the Unity, namely, that it was “on the south side of the River Tyne, opposite the Black Middens—usually called the Second Bar—and close to the edge of or over the northern portion of the Herd Sand.” Let us take this latter statement to be true. I should tell you that the Neptune will be responsible for all her acts, and the owners of the Unity for all acts done or omitted to be done either by the Unity or the tug towing her—a sort of double responsibility. It appears from the statement that the Neptune descried the Unity, which was without a light—admitted so—at the distance of about 100 fathoms, and it appears that the Unity descried the steamer, which had three lights, at about the same distance. I shall have an observation to make presently, when I come to the case of the Unity, as to her not seeing these lights at an earlier

Place of the
collision.

Distance at
which they saw
each other.

period; but now I will proceed with the case of the Neptune. The Neptune was coming down, and according to her own statement—whether in mid-channel, or rather to south of mid-channel—she describes two tugs, the Liberty tug on the port side, and the light of the tug Pilot nearly right ahead and slightly on the starboard bow. At that period she did not see the Unity at all, and she endeavoured to keep her course between the two tugs, and so proceed to sea; but as she was pursuing that course she discovered the Unity a little on her port bow and then she put her helm to port to pass between the tug and the sloop; the Unity did the same, but it was too late, and the collision occurred. We must bear in mind the Act of Parliament, and I need not repeat that it is our duty to adhere to the true construction of that Act. The first question I shall have to ask you with regard to the Neptune is, whether she was to blame for pursuing the course which she did down the river? According to her statement—and it is not contradicted—she came midway down the river, rather to the south, and inclined to the south, before she approached the spot where the collision took place. It is contended that she was to blame for so doing. The Act of Parliament specifically directs that “every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship.” We must take the case step by step, because the observations I am about to make will apply not only to the Neptune, but to the Unity also. I presume that this is, properly speaking, a narrow channel—if not, you will correct me. “Whenever it is safe and practicable;”—what is the meaning of these words?—I apprehend it to be, where there is no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring, then the obligation continues to keep to the starboard side, and no consideration of convenience, no opportunity of accelerating the speed, none whatever, can justify a disobedience to this statute. Then we come to consider the fact of the custom; and it has been argued before you that the custom clearly prevails in the River Tyne, that tugs going up that river with vessels in tow shall keep to the south side, and steamers coming down keep to the north. If they do so, that is a clear violation of the Act of Parliament, unless there are some local peculiarities of which I know nothing; and if the custom as stated in the evidence be a custom at all, it is not a custom recognized in law. You will, therefore, have to decide, with respect to the Neptune, whether there are any peculiar circumstances in the case which

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Case of the
Neptune.

Neptune was
going down to
the south of
mid-channel,
in accordance
with Act of
Parliament.

Custom of port
to go up to the
south, down to
the north of
mid-channel.

Custom of port
no justification
for disobe-
dience to the
statute.

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May 2.

Case of the
Unity.

Was not the
tug to blame
for going up
on the south
side?

rendered such conformity with the Act of Parliament a wrong course. You will have another question to consider with respect to the Neptune. It is contended that when she saw these tugs she ought to have starboarded her helm, and gone to the north. Now, if she had seen both tugs together at the same time, and the Unity in tow of this tug, and the river clear to the northward, could she have avoided the collision by departing from the Act of Parliament? If so, then she would have been justified in departing from it; but she would not have been justified in starboarding her helm unless there was inevitable necessity. Therefore, the question I shall have to put is, was she to blame for not starboarding her helm, or not porting, when she saw the light of the tug Pilot, and whether by either step she could have avoided the collision or not? She did not port her helm on seeing the Pilot, but continued her course till she discovered the Unity, and then she ported; I shall ask you, whether you consider she was too late in porting, or that there was any neglect in that respect? Now for the case of the Unity. I shall have to ask you, was not the tug to blame which had charge of the Unity for coming up on the south side? and also, was not the tug to blame in not porting when she saw the steamer, and when she must confessedly have had time to do so? You then will have to consider a matter upon which I can form no opinion at all, namely, whether she could not have cast off the line fastened to the Unity, and whether it would have produced any effect? With regard to the Unity not showing a light, I am clearly of opinion that she was bound to show a light. The words of the Admiralty regulations are specific and perfectly intelligible. Then you will have to consider whether the Unity ought to have been on the south side of the channel, and whether the not showing a light was in any degree the cause of the collision or contributory thereto? whether, if a light had been shown in due time, it might have given warning to the steamer, and have induced the steamer to take other measures which would have prevented the calamity? I have heard no excuse from either of the counsel for the statement made in her own preliminary act, that this steamer, which carried three lights, was not seen till the Unity was within 200 yards of her.

The Court and the Elder Brethren having retired for consultation,—on their return,

Neptune to
blame for not
porting.

DR. LUSHINGTON said :—With respect to the Neptune, the gentlemen by whom I am assisted are of opinion that she was

to blame for not having ported her helm as soon as she saw the light of the Pilot tug,—not for not having starboarded it, as has been argued, but for not having ported it. With regard to the Unity, we are all of opinion also that she was to blame for not having hoisted a light in due time, and that it was a contributory cause to the collision. The result is, neither party can recover.

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Unity for not
showing a
light in time.

Addams, proctor for the Unity.

Coots for the Neptune.

THE NAUTILUS, D. McMURTRIE, *Master*.

Salvage—Award by consent before Justices—Salvage Suit afterwards commenced in Court of Admiralty—Tender accepted—Salvors condemned in Costs and Damages.

THIS was an application to the Court for costs and damages. Salvage services had been rendered to the Nautilus and her cargo. Notice was given to the owners that two justices of the peace would meet on a given day, but when they assembled it was discovered that the salvage took place more than three miles from the shore, so that, according to the construction put on 460th section of Merchant Shipping Act, the jurisdiction of the justices would be ousted. The case, however, was heard before them by consent both of owners and salvors, and the justices awarded 53*l.*, directing the costs to be borne equally between the parties. The salvors refused to accept the award, or to appeal from the magistrates' decision, but they entered an action in this Court against the ship and cargo in the sum of 250*l.* The owners brought 53*l.* into Court, which they tendered to the salvors. The vessel remained some time under arrest, and then the proctor for the salvors accepted the tender. The owners now sought to have the salvors condemned in the costs and damages which had been occasioned by the improper arrest of the ship.

Bayford appeared for the salvors.

Haggard for the owners.

DR. LUSHINGTON :—This is an application on behalf of the owners of the Nautilus for costs and expenses which have been

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incurred in consequence of certain proceedings in this Court. It appears that some salvage service, of the nature of which the Court is entirely ignorant, was performed. The vessel was arrested, and the proceedings were about to be commenced before the magistrates. A doubt arose respecting their jurisdiction, but by the consent of both parties they proceeded to an adjudication. They decided that 53*l.* should be paid, and that the costs should be borne in equal moieties—which, though it would be a strange decision in these Courts, is not, it would seem, unusual in cases heard before magistrates in the country. The owners then tendered the 53*l.*; but the salvors, although they had bound themselves to accede to the decision of the magistrates, refuse to accept the amount, but arrest the vessel in this Court in a cause of salvage, and when that sum, which they might have had before, is tendered to them in Court, they accept it. It appears to me that this is a grossly factious proceeding, and I shall decree costs and damages.

On a reference to the Registrar, the damages for the illegal detention of the vessel were estimated by him at the sum of 53*l.* 6*s.* 8*d.*, besides the costs of suit.

Jenner, proctor for the salvors.

Rothery for the Nautilus.

THE GLORIA DE MARIA, J. B. DE ONDARZA, *Master*.

Salvage service at Dover—Appeal from Award of Commissioners of Cinque Ports—Action subsequently entered in High Court of Admiralty and abandoned—Salvors condemned in all Costs and Damages caused by the latter proceedings.

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THIS was a suit brought by the steam-packet L'Impératrice against the Spanish schooner Gloria de Maria, to obtain salvage compensation for services rendered to her on the 3rd of April last. The schooner having put into Dover windbound, on attempting to leave the harbour struck against the north pier, whereby the fluke of her anchor, which was hanging a-cockbill, was driven through her port bow. She received the assistance of the steam-packet and a lugger, and the case was referred to the Commissioners of the Cinque Ports to allot the

reward to which they were entitled. They awarded to the steam-packet 40*l.* and to the lugger 10*l.* The steam-packet was dissatisfied with the decision, and lodged an appeal against it, but subsequently arrested the schooner by warrant from the High Court of Admiralty in an action for 1,200*l.* An appearance having been given the action was abandoned, and the owners of the schooner now applied for costs and damages.

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Addams appeared for the schooner.

The Admiralty Advocate for the steam-packet.

DR. LUSHINGTON:—This action is clearly illegal to all intents and purposes. The parties were misinstructed—how, it is not for the Court to inquire. An injustice has been done to the schooner. The steam-packet first proceeded to recover salvage before the Commissioners, and then when a certain sum was awarded an appeal was entered and bail taken to the amount of 80*l.*, after which the vessel was arrested. It is clearly a case in which I am called to do justice to the schooner, and put her in the same situation that she was in before. I must, therefore, pronounce for the costs, damages, demurrage, and expenses.

Tatham, proctor for L'Impératrice.

F. Clarkson for the *Gloria de Maria*.

THE HAND OF PROVIDENCE, A. BULMAN, *Master*.

Collision—Custom of River Tyne, 297th & 298th Sections of Merchant Shipping Act.

A brig, in ballast, coming up the Tyne, along the south shore, came into collision with smack being tugged down along the same shore. She pleaded in defence a custom of that river, that vessels in ballast should come up along the south shore. Held, that no such custom could be maintained against the express provisions of the Merchant Shipping Act.

THIS was a suit promoted by the smack *Medora* against the brig *Hand of Providence*, to recover the loss arising from a collision between them in the lower part of Shields Harbour at 10-30 a.m., on the 18th of December last. The smack was

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proceeding down the River Tyne, coal-laden, in tow of a steam-tug, when she met the brig, which, as she said, without any apparent cause, starboarded her helm, and ran against her. The brig alleged that she was coming up the river in ballast on the south side, and was in the act of staying, and performing the usual manœuvres with the view to taking up her berth, when the collision occurred, and that the accident arose from the smack attempting to pass on the wrong side of the Channel.

Addams and Curteis were heard for the smack.

Bayford and Deane for the brig.

Judgment.

DR. LUSHINGTON, addressing the Elder Brethren, said:—Gentlemen, though the stake is a small one on the present occasion, yet the question which is agitated is one of very considerable importance, because it affects the navigation of a river where, as we all know, there is a constant trade carried on. I need not tell you that I should be as anxious as any man could be, provided it was consistent with my duty, to adopt that decision which would most aid the convenient and safe navigation of the river—provided I am at liberty to take that course. But if the Act of Parliament ties my hands, it is my duty to point out to you the difficulty. I am afraid it is my duty, if the construction of the Act of Parliament should be different from the custom, to abide by the Act of Parliament. Allow me first to put before you the facts, which are very short. It is alleged, on behalf of the *Medora*, that, at ten o'clock in the day she was in tow of a steam-tug, going down the River Tyne; that she noticed the *Hand of Providence* distant a cable's length on her port bow, sailing up the river, the wind at the time blowing fresh from the S.E., and the tide being about half flood—that is, I apprehend, favourable to the vessel's sailing up the river. The brig continued her course until she was about two ships' length distant from her, and nearly ahead of the steam-tug, when all at once, without any apparent cause for so doing, those on board the brig put her helm to starboard, and stood her directly over towards the smack. Then they say that the steam-tug's helm and the smack's helm were put hard to port, and the steamer's engines were stopped, and her crew loudly and repeatedly hailed the brig to port her helm, but which she did not do, and then that the collision occurred. They say further, that the smack kept as near as she could with safety to the south shore, and that there was ample room for the brig to pass clear. They state that no blame attaches to them, and

Facts of the case.

Smack was going down on south side of mid-channel.

so on. On the other side, the facts of the location of the vessels, if I may so call it, are admitted to be true, but they say blame attaches to the steam-tug and smack for improperly keeping to the south side of the river, instead of going on the customary side for laden vessels, and also for not going astern when hailed so to do—that is, for not starboarding; and also for not stopping the engines, and not casting off the tow-line in passing. Whether she could have stopped her engines, or whether she was wrong in not casting off the tow-line, are points you will have to determine, but it is a question separate from the main question we have now to discuss. Now, gentlemen, the question is this—what is the proper construction, under all the circumstances, of the 297th section of the Merchant Shipping Act?—“Every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship.” Now we have had several previous cases occur in relation to this section of the Act. The previous Act of Parliament is worded nearly in the same terms. It was attempted to set up a custom in the River Thames (a) and the River Mersey (b); and after great consideration—I was assisted on both occasions by gentlemen from the Trinity House—we determined that the reasons alleged for the custom were such as we could not entertain—that to have supported the custom would have been a violation of the Act of Parliament. Among other reasons it was stated that the water would be deeper on that side—that the tide flowed a certain strength, more or less, as the case might be—than on the side provided by the Act of Parliament. I conceive, however, that the steamer must obey the statute, unless it is not practicable for her to do so. The words of the statute are—that they shall keep to the starboard side whenever it is safe and practicable. If it is not safe and not practicable, then they may be excused from obeying it; but they must not deviate from any consideration of convenience or expediency. Now I have said, and I repeat it, that the statute would not prevail if there was a permanent local peculiarity, as a rock, which would render obedience to the statute dangerous; or an accidental impediment—as a wreck; or if the state of the weather was such as to render it dangerous to attempt it. But no custom, no rule, can prevail to justify any deviation from the Act. This brings me to the evidence in this case,

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Alleged custom for vessels going down to keep to north side.

Merchant Shipping Act, sect. 297, directs steamships to keep to the starboard side of mid-channel.

No local custom can prevail to justify a deviation from the Act.

(a) *Duke of Sussex*, 1 W. Rob. 274; and *Sylph*, 2 Eccl. & Adm. 76.

(b) The *Nimrod*, decided in the Court of Admiralty on the 18th De-

cember, 1851, and in the Court of Appeal on the 18th June, 1852, but nowhere reported.

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and then we shall see if we can bring it within the terms of the statute. I now suppose the point to be put directly in issue, which I am sorry to say it is not, namely, that steamers going down the river keeping to the south side would be productive of danger. There is no such thing put in averment at all; but the statement on behalf of the Hand of Providence is this, "that above the direct ferry the course for laden vessels is to the south of the River Tyne, the deep water being there, and a sand, called the Dotwicke Sand, lying along the north side of the river; but below the direct ferry there is a sand on the south side, called the Insand, and the deep-water channel for laden vessels going down the river lies along the north side, keeping as close to the tiers of ships there as possible, and it is the universal rule to keep light vessels to the south side and laden vessels to the north side there." Now you will take that into consideration. Then an affidavit states that the rule is followed, because it gives the deep water along the north side for laden ships, and the shoal water on the south side for light ships. We had the other day the case of the *Unity*, which was of this description. The *Neptune*, a steamer, was going down the Tyne laden, and she kept to the southward of mid-channel. She met two steam-tugs, one of which had a vessel, the *Unity*, in tow. The steamer did not see the *Unity*, and ran into her. It was contended by the learned counsel for the *Unity*, that the *Neptune* ought to have starboarded her helm; but I put it to the gentlemen who assisted me, and they were of opinion that she ought to have gone more to the southward; therefore they found that the *Neptune* was to blame, and the *Unity* was also to blame, because she did not hoist a light.

The Court and the Elder Brethren retired for consultation, and on their return,

Judgment.

DR. LUSHINGTON said:—The gentlemen by whom I am assisted are of opinion that they cannot say that it was unsafe or impracticable to take the course prescribed by Act of Parliament, therefore the Act of Parliament must govern the case. If this is productive of great inconvenience the remedy must be sought elsewhere. I pronounce against the Hand of Providence.

Engleheart, proctor for the *Medora*.

Stokes for the Hand of Providence.

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May 14.

THE JANET MITCHELL, THOMAS HOOD, *Master*.

Salvage awarded to Owners, Master and Crew of a Vessel whose Mate had gone on board another Vessel on the high seas, to supply the place of the Master of the latter, who had been drowned.

THIS was an action brought by the barque Ellen against the ship Janet Mitchell, to obtain salvage remuneration under the following circumstances :—The barque, on her homeward voyage from Ceylon, fell in with the Janet Mitchell in a state of distress, bound from the Mauritius to Falmouth with a cargo of sugar. After bearing down upon her, it was ascertained that the captain had been drowned, and that some one was required to navigate her. The mate of the Ellen volunteered his services, which were gratefully accepted, and the two vessels proceeded on their respective voyages, and reached their destination in safety. The owners of the Janet Mitchell gave the mate 200*l.* and appointed him to the command of a vessel. The present suit was then brought by the owners, master, and the rest of the crew of the Ellen. The value of the property saved was 29,700*l.*

Bayford and *Spinks* appeared for the Ellen.

Addams and *Deane* for the Janet Mitchell.

DR. LUSHINGTON :—Under all the circumstances, I award Judgment 1,000*l.* to the salvors.

Rothery, proctor for the salvors.

Orme and *Edwards* for the owners.

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THE ARGO, LJUNGREN, *Master*.

Salvage—Costs—Jurisdiction of the Court.

Where the ancient jurisdiction of the Court is restricted by Act of Parliament, the burden is on those who wish to avail themselves of the restriction to give full proof of the circumstances (*e.g.*, the distance of three miles from the shore) which lay the ground for the restriction, and in case of doubt the Court will not consider its jurisdiction ousted.

Seemly, where a vessel is already in the custody of the Court, it is an open question whether salvors might not in all cases, notwithstanding the 460th section of the Merchant Shipping Act, institute proceedings in the High Court of Admiralty.

ON the 8th of October last the *Argo* was arrested in the sum of 200*l.* in a cause of salvage instituted by the smack *Audacious*, she being at the time under arrest in a cause of collision. An appearance was subsequently given for the owners of the *Argo*, and on the 28th of December a minute was agreed upon between the two proctors, and which was in the following words:—"The surrogate, at petition of Jenner, with consent of Coote, by interlocutory decree, pronounced the sum of 50*l.* to be due to Jenner's parties for salvage, pursuant to the agreement set forth in the Act on petition, and condemned Coote's parties in costs." It was now objected, on behalf of the owners of the *Argo*, that there were no costs whatever due to the salvors, on the ground that the services had been performed between Hasborough and Winterton Lights, within three miles of the shore, and that consequently the Court, under the 458th and 460th sects. of the Merchant Shipping Act, had no jurisdiction.

Spinks appeared for the owners.

Jenner for the salvors.

Judgment.

DR. LUSHINGTON, without hearing counsel for the salvors, said:—In this case the salvors had originally made an agreement to receive the sum of 50*l.* for their services; delay having occurred in the payment of the money, they arrest the vessel in this Court, she being at the time under arrest in a cause of collision. Thereupon the 50*l.* is paid by the owners, and an objection is now taken to the payment of the salvors' costs on the ground that the Court had no jurisdiction in the principal cause. The objection, however, to the jurisdiction of the Court comes rather late, because it comes after the principal cause has been decided and after the money has

been paid. I am by no means prepared to say that the consent of the parties having gone so far would not bar them from taking an objection to the jurisdiction of the Court. It is not necessary to decide that point, but I wish it to be understood that I do not accede to the proposition that where two parties have been litigating a case for a considerable time, and the principal matter has come to a conclusion, that then upon the question of costs one can turn round and deny the jurisdiction of the Court. The main objection, however, to that jurisdiction is, that the alleged value of the services rendered was not more than 200*l.* and that it was rendered within three miles of the shore. It must be admitted that the Court, having jurisdiction in all cases not excepted by the Act of Parliament, it lies on those intending to dispute its jurisdiction to show that the Court is debarred from its ordinary course of proceeding. Three affidavits are produced on each side, and it is said that those on behalf of the owners are entitled to greater consideration than those of the salvors. If the Court entertained a doubt as to the locality, I apprehend it is perfectly clear the jurisdiction could not be ousted. The master swears the vessel was brought up off Winterton—Winterton Light bearing S.W. half W. on the compass, distant about three miles. Great reliance has been placed on this fact, the master having stated that he took the bearings of the Argo from Winterton Light shortly after he brought up, and made an entry in the log-book of the Argo. The master might have taken the bearings of the light accurately, but the distance of three miles was a mere matter of conjecture on his part. He had no particular knowledge of the locality, and nothing to guide him but the naked eye. I cannot say that much reliance is to be placed on an observation so made, without any object to induce him to be accurate even in that respect. There is the affidavit of Johnson, which is more entitled to consideration, because he was on board as a coasting pilot. He states that, according to the best of his judgment and belief, the schooner was not more than two miles and a half distant from the shore of the coast of Norfolk. So that here I am driven, according to this statement of the owners, to estimate a distance at sea of half a mile, and no more. I apprehend that if it stood there the point to be established by the owners would not be proved by any testimony on which I could by possibility rely. But when I put this in competition with the other evidence, I must say, that if I am asked to determine what distance the vessel was from the shore, I should come to the conclusion that she was more than three miles from it, rather than within that distance. On this ground I must overrule the prayer of the owners

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Burden of
proof on those
who dispute
the jurisdic-
tion.

Vessel not
shown to have
been less than
three miles
from shore.

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Vessel in custody of the Court.

Quare, whether in such case salvors might not always resort to the Court.

as to costs. I wish it to be understood that in all these cases, which unfortunately must depend on the precise locality in which the service was rendered, (though the Court would be very reluctant to encourage, as it always has been, these petty cases being brought here,) I must exercise the jurisdiction entrusted to me until it is proved that that jurisdiction has been taken away by an Act of Parliament. On the present occasion there are no reasons which induce me to come to the conclusion that the hands of the Court are tied from the exercise of its jurisdiction. In the first place, the vessel was in the custody of the Court;—and I put the matter thus to the counsel for the owners—supposing the case had been left to the justices of the peace to decide, and supposing they had decided that the agreement was binding, what possible remedy would the salvors have had to recover that which the justices considered due? I think it impossible to give any satisfactory answer to that question. I was well aware of it, my attention having been previously drawn to the provisions of the Act. It may be observed here that the whole jurisdiction of the receiver is completely put an end to if this Court or any other competent Court should be in possession of the vessel and cargo. I have no occasion to determine at present what will be the effect of that possession. It is an open question whether the salvors are not entitled to proceed here in any case where the property is under arrest. There may be a good reason for this. If it were not so, and the property were to be sold in a case of bottomry or damage, the salvors, who are entitled to priority in all cases, would not come in even *pari passu* to obtain that to which they are entitled. I wish it therefore to be understood that I by no means say that the jurisdiction does not extend to all salvage cases where the vessel has been previously arrested in any cause, and where the Court has a command over the ship and proceeds. I pronounce for the costs, including those of this petition.

Jenner, proctor for the salvors.

Coote for the *Argo*.

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*June 5.*THE PEACE, F. J. NATT, *Master.**Salvage—Valuation of Cargo—Appearance of Owners of Cargo after Decree—Costs.*

400*l.* was decreed, in pursuance of an agreement for that sum, for salvage service to ship, cargo and freight. The values of ship and freight only were then known. Afterwards the owners of the cargo were proceeded against, and offered to pay their proportion of the 400*l.* upon the net proceeds of cargo. Held, in ascertaining net value of the cargo, that 2½ per cent. discount, and certain other items sworn to be accustomed charges, might be deducted, but not a gratuity of 5*l.* 5*s.* to the master; and that costs of the original proceedings must be borne by the owners of the cargo proportionably with the owners of the ship, though the former were not before the Court when the decree was made.

THIS was originally a cause of salvage; the services were rendered off Malaga. The action was not entered until after the cargo had been discharged, and no appearance was given for the owners of the cargo (*a*). The value of the ship was taken at 1,200*l.*, and the amount of freight at 370*l.*, and the value of the cargo was stated in the pleadings to be 3,000*l.* It appeared at the hearing, that the master of the Peace had agreed with the master of the salving vessel to pay 400*l.* for the services, and the Court decreed that sum to be due, and condemned the owners of the ship and freight in such proportion of the sum of 400*l.* as the value of the ship and freight bore to the whole value of the property saved.

The owners of the cargo were subsequently proceeded against, and an appearance was given for them, and on their behalf it was alleged that the value of the cargo according to the account sales was as follows:—

	£	s.	d.	£	s.	d.
Gross value of cargo	2,192	9	0			
Discount 2½ per cent.	54	16	3			
	<hr/>			2,137	12	9
Custom House entry, &c.	0	7	6			
Freight	368	2	0			
Gratuity	5	5	0			
Weighing	31	19	7			
Brokerage	21	18	6			
Commission	43	17	0			
	<hr/>			471	9	7
Net				<hr/>		
				£1,666	3	2

(*a*) Vide *supra*, p. 85.

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and the questions to be decided now were, whether the above were proper deductions to be made in ascertaining the value of the cargo for the purpose of apportioning the salvage, and whether any and what change should now be made in the decree pronounced by the Court, when the value of the cargo was supposed to be 3,000*l*.

Addams, for the salvors, contended that they were entitled to the full sum of 400*l*. and costs, as originally decreed.

Jenner, for the owners of the cargo, offered to pay their proportion of the 400*l*. upon the net proceeds of 1,666*l*. 3*s*. 2*d*.

Deane, for the owners of the ship and freight, submitted that if the Court had been aware the cargo was worth not much more than the half of 3,000*l*., the sum of 400*l*. would not have been decreed; that the deduction for discount should not be allowed, as immediate payment was for the sole benefit of the owner; that the gratuity being a voluntary payment, could not be claimed; and that the practice of the Court in salvage cases being, as to the other charges except the freight, not to make allowance for them, but to take the value of the cargo as it lay in the ship, they should all be disallowed; and that the costs of the original proceedings should be borne rateably by the owners of the ship and cargo in the same proportion as the salvage.

Judgment.

DR. LUSHINGTON:—The 400*l*. was awarded without reference to the value. The salvors demanded 500*l*., but on behalf of the owners it was alleged, that the master of the *Brunette*, the salving ship, had bargained for 400*l*., and I pronounced for that sum. The salvors therefore must receive 400*l*. with costs. With respect to the apportionment of this sum amongst the respective parties, I must first ascertain the value of the property. Some of the items objected to are necessary expenses; the cargo could not be sold without them, and I must allow them unless it is contrary to the rules of trade. With regard to the 5*l*. 5*s*. for primage, that is a gratuity and is not to be a deduction. With regard to the discount, amounting to 54*l*. 16*s*. 3*d*., I take it that originally the party would have been entitled to a larger sum at a distant period, and that for his own convenience he obtained prompt payment by allowing a discount. But it is sworn that the several charges, including this discount, are the usual accustomed charges, and I cannot, therefore, refuse to allow that and the other deductions except the gratuity. Now that fixes the value of the cargo. With

The charges on the sale of cargo must be deducted from the gross value.

regard to costs, I think it only equitable that they should be thrown on all the property salvaged. It is true the owners of the cargo did not come in in the original suit; they left the owners of the ship to defend the suit, and say they are now ready to pay their share of the salvage. Extreme injustice would be done if the Court were to sanction that course. The owners of the cargo would lie by, and then when the owners of the ship had obtained a reduction of the amount of salvage claimed, they would take advantage of it. The Court is frequently placed in extreme difficulty in decreeing salvage when there is only a part of the property before it—in the first place, it has no *constat* of the value; and in the second place, it has not its hand upon it. It must, therefore, either hold its hand till everything is settled, or it must go on with the suit; and that is a difficulty I have often had to encounter. All I can say is I must do the best I can under the circumstances when they arise.

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Costs to be borne rateably by all the property.

Rothery, proctor for the salvors.

Pritchard for the owners of cargo.

Crosse for the owners of ship.

THE LIDSKJALF, LARSEN, *Master*.

Ships aground—Tide Falling—Damage by heeling over.

B. took up a berth in the Tyne, with the view of discharging cargo; C. took up a berth close alongside, and, as the tide fell, heeled over upon B. and damaged her. Held, that C. was responsible for the damage so received by B. Amount thereof referred to the Registrar and Merchants.

THIS was an action brought by the brigantine George against the Norwegian barque Lidskjalf, to recover compensation for loss arising under the following circumstances:—The brigantine had arrived in the river Tyne with a cargo of pottery-clay from Poole, portions of which had been discharged. On the 8th of February last the barque brought up so close alongside her, that when the tide fell she listed heavily against her, and caused her much damage. The barque, in her defence, alleged that the accident arose from the brigantine neglecting to take sufficient precautions to prevent her from heeling over as she grounded with the falling tide, and that any damage which she

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had sustained from the pressure of the barque was solely owing to her own negligence in not being properly secured.

Deane and Spinks were heard for the brigantine.

Addams and Curteis for the barque.

Judgment.
Facts in the
case.

Statement of
the George.

Statement of
the *Lidskjalf*.

DR. LUSHINGTON said :—This action is brought on behalf of the owners of the *George* against a Norwegian barque. The complaint is, that damage was done to the *George* in consequence of the barque having been laid too closely to her when she was anchored off the Low Lights, North Shields, the result of which was that she heeled over upon her and strained her. Now, that very considerable damage has in some way arisen to the vessel since she entered North Shields there can be no doubt whatever, and it is not possible for the party proceeded against to deny it. The damage amounts to 394*l.* 9*s.* 11*d.*, the whole value being 575*l.* If any part of this damage, whatever be the proportion, has been culpably occasioned by the act of the Norwegian barque, of course I must hold her owners responsible for that damage, be it small or great. This being so, let us look at the circumstances as stated in the proceedings. It appears that the *George*, laden with pottery-clay, arrived in the Tyne early on the 6th February, and was placed by a pilot in a proper berth to discharge her cargo. That is, of course, the statement on the part of the *George*. Whether it was a proper berth or not is a question which I need not discuss, because no vessel had a right to place herself so close to her as to cause her damage. It is sworn that she was lying safe. She continued discharging her cargo until between 5 and 6 p.m. on the 8th February. About this time the master perceived a barque approaching her. It is stated on behalf of the owners of the barque, that application was made to the master of the *George* for leave to have the barque laid alongside her, and it is said that such consent was given. It is perfectly clear, however, from the evidence of three or four witnesses, that when the master of the *George* saw the barque approaching he bailed her to keep further off; that he was apprehensive of danger from the proximity of that vessel to the *George*, and he cautioned her master against so placing her. In spite of that caution the pilot on board thought fit to place her in the close neighbourhood of the *George*. It appears that the Norwegian vessel had been laid on the shore only to be cleaned, so that it was not necessary to lay her as it would have been to discharge a cargo. On the night of the 8th February, it is clear that damage was done to the *George*. The Norwegian barque,


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as she states, took every possible precaution by placing fenders between her and the George ; but it failed for an obvious reason—the Norwegian listed over her, and the George became strained, notwithstanding the fenders. In order to prevent mischief, some steps ought to have been taken to keep the vessel upright. It is proved by the evidence that on the following morning the starboard bilge of the barque was resting, not on the shore, but her starboard side was lying on the midships and gangway of the port side of the brigantine, which was bearing the whole weight of the barque. I do not know how this could have been prevented by the persons on board the George. Taking this to be true, it has been argued with great ingenuity that the Court would have much difficulty in establishing what damage arose from defects in the George herself, she having been aground previously to the 8th of February, when the Norwegian was brought up close to her, and what was the extent of damage done afterwards. But be that as it may, it is a question which the Registrar and Merchants must determine. If the Court is satisfied that any damage was done by the Norwegian she is liable for that damage, and my decree must be accordingly. I apprehend that when a vessel is lying on the shore, and another vessel is placed voluntarily by her owners, or those who are acting on their behalf, in such a position that damage will happen if some event arises which it is not possible to control, the owners of the second vessel must be responsible for the damage. That is a position not denied on the present occasion. For reasons of convenience the barque is placed in close proximity to the George, and those persons must bear the risk who voluntarily place a vessel in a position where danger may arise to another. No observation has been made, and I think properly so, on the barque having been placed in this situation by a licensed pilot, and for a very good reason, as it appears that the taking of a pilot was not compulsory. I regret that a matter of this small description should become the subject of discussion in this Court, but I am under the necessity of pronouncing against the barque ; and I must refer the case to the Registrar and Merchants to ascertain the amount of damage done. I must also give the costs.

Gregory, proctor for the George.

Engleheart for the Lidskjalf.



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June 13, 14.THE MANGERTON, R. BOUCHIER, *Master.**Ship—Collision—Merchant Shipping Act and Admiralty Regulations as to Lights—Report to Board of Trade—Coroner's Inquest.*

A sailing vessel, steering W.S.W., wind S. by E., saw a light a-head on the star-board bow, which the mate mistook for Dungeness light, and starboarded the helm; when he discovered the light to be that of a steamer, he continued his course. The steamer, on seeing the light of the sailing vessel, ported her helm; in the event, struck the sailing vessel on her starboard side and sunk her. Held, that the sailing vessel was to blame for not porting her helm when she made out the red light of the steamer; that a signal lamp on the bowsprit end of a sailing vessel, with a white glass in the centre, a red glass on the port, and a green one on the starboard side, was not in accordance with the Admiralty regulations as to lights, and contributed, by misleading the steamer, to the collision.

The Admiralty regulations, as to lights, of 1852 remain in force under 17 & 18 Vict. c. 120. Copy of the report of the stipendiary magistrate and assessor, printed by order of the House of Commons, no evidence in Court of Admiralty—nor the sayings or doings of a coroner's jury.

THIS was a cause of damage arising from collision, brought by the owners of the ship *Josephine Willis* against the owners of the screw steamer *Mangerton*. The collision took place on the evening of the 3rd February in the present year, off Folkestone, and resulted in the total loss of the ship, which was outward bound to New Zealand, and of the lives of many of the passengers and crew.

An action was entered against the *Mangerton* in the sum of 65,000*l.*, but bail in the sum of 20,000*l.* was taken by consent. The owners of the steamer *Mangerton* also entered an action against the *Josephine Willis* in the sum of 6000*l.* The proceedings were by plea and proof. The libel on behalf of the *Josephine Willis* stated her to be a ship of about 786 tons, on a voyage from London to New Zealand, with a crew of forty hands, many passengers, and a valuable cargo on board; that when the pilot left her about 5 p.m. on 3rd February off Deal, the chief mate, Clayton, took charge of the deck; that a bright signal-lamp, showing three lights, a bright light in the front, a green light on the starboard side, and a red light on the portside was fastened on the bowsprit end; that at 7 p.m., in consequence of the wind having hauled from S.E. to S.S.E., or S. by E., her yards were braced nearly sharp up, and bowlines hauled, and she proceeded, steering W.S.W., at the rate of seven knots; that the

Libel on behalf
of the *Jose-*
phine Willis.

atmosphere was clear above and starlight, but that there was a haze on the water to about half-mast high. About eight o'clock one of the look-out on the topgallant-forecastle reported a light a-head on the starboard bow; that the mate went forward and saw the light about half a point on the starboard bow but indistinctly, and imagining it to be Dungeness light, ordered the helm to be starboarded, with the view of opening the land; that the ship then came up from W.S.W. to S.W. by W., at which point her helm was steadied by order of the mate; that about a minute after the helm had been steadied the look-out forward saw a green light, and the mate, who had returned to the starboard side of the poop, saw first a red, and immediately afterwards a green light; that they were then for the first time aware that the light they had taken for Dungeness light was in fact the mast-head light of a steamer approaching them rapidly; that her green light then became well open, and from three to four points on the starboard bow of the Josephine Willis, and in a direction to pass well clear and astern of her; that the Josephine Willis kept steadily on her course, but that the helm of the steamship was suddenly, and when too late, put to port, the order for which was distinctly heard on board the Josephine Willis, and a collision was thereby rendered inevitable; that the helm of the Josephine Willis was then put hard down, by order of the mate, to throw her up into the wind and ease the blow; that in about six or eight minutes after her mast-head light had been sighted, and in about two minutes after her coloured lights had been seen, the steamer, at great speed and with her helm hard a-port, ran stem on and cut into the starboard side of the Josephine Willis before her main rigging. The collision was imputable solely to those on board the steamship Mangerton for having ported her helm when too late.

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June 13, 14.

The allegation brought in on behalf of the Mangerton stated her to be an iron screw steamship of about 363 tons, with engines of 130-horse power, and a crew of twenty-five hands, trading between Limerick and London, and on her voyage to the latter port; that at 6 p.m. of 3rd February the master's watch commenced, consisting of the master, boatswain, an experienced seaman acting as second mate, and four seamen; that between half-past seven and eight the master and chief officer went below for the purpose of pricking off from the chart the ship's course, in case they did not meet a pilot in the Downs; the deck was left in charge of the boatswain; that the Mangerton was then off Folkestone, steering E. by N. half N., with the wind fresh from S.E. by E., going at the rate of seven or eight knots an hour; that a

*Allegation on
behalf of the
Mangerton.*

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June 13, 14.

light was reported by the man on the forecastle on the Mangerton's port bow ; that such light was seen by the boatswain, who at first took it for the South Foreland light ; that in about two minutes it suddenly disappeared, when the helm of the Mangerton was put to port and her course was altered to E. by N. ; that in about three or four minutes after the light was again seen, distant about a quarter of a mile, about a point on the Mangerton's port bow ; that the helm of the Mangerton was then put to port and hard to port, and her course altered four points to S.E. and by E. ; that the master and chief officer, hearing such orders to port the helm given by the boatswain, both ran up on deck repeating the order, to put the helm hard-a-port, and ordering the engines to be stopped ; that by reason of the helm of the vessel, whose light was so reported, having been put to starboard, she came across the bows of the Mangerton, thereby causing the Mangerton with her port bow to strike the Josephine Willis between her main fore-rigging on the starboard side ; that the collision was imputable solely to those on board the Josephine Willis by their having, on first seeing the light of the Mangerton, mistaken it for Dungeness light, and having thereupon put her helm to starboard, and from not having exhibited a light within the intent and meaning of the Admiralty regulations, and by want of good seamanship on board the Josephine Willis.

This case was argued by *Addams* and *Twiss* for the Josephine Willis.

Robinson and *Bayford* for the Mangerton.

Report to the
Board of
Trade.

Annexed to the interrogatories administered on behalf of the Mangerton, was " Return to an order of the Honourable the House of Commons, for copies of the reports of Mr. Yardley, the stipendiary magistrate, and Captain Robertson, the assessor, on the late collision between the Josephine Willis and the Mangerton steamer, presented to the Board of Trade." This the learned judge, at the hearing of the cause, ordered to be struck out of the evidence as not being verified, and *res inter alios acta*.

Of the interrogatories administered on behalf of the Josephine Willis, part of the twentieth had reference to remarks made by the jury, who inquired into the circumstances of the death of one of the seamen drowned, and as to the verdict of the jury ; this also the Judge ordered to be struck out.

The protest of the Mangerton was not produced in this case.

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A question in argument arose, as to the light exhibited by the Josephine Willis, whether the regulations published by the Admiralty in 1852 (*a*), under 14 & 15 Vict. c. 79, since repealed by 17 & 18 Vict. c. 120, were in force or no, and it did not appear that any corresponding regulations had been published by the Admiralty under the 295th section of the present Merchant Shipping Act. On the other hand, it was argued that the regulations of 1852 would fall under the 7th exception contained in the 4th section of 17 & 18 Vict. c. 120 (Merchant Shipping Repeal Act, 1854), and would still continue in force.

Admiralty regulations as to lights.

The Court was assisted by Captains *Pixley* and *Pitcairn*.

Dr. LUSHINGTON, in stating the case to the Trinity Masters, said :
—I am of opinion that the Admiralty regulations of 1852, as to lights, do fall within the exception referred to, and are still in force; I think that the words “but shall be subject to such provisions of the Merchant Shipping Act as are applicable thereto respectively” were intended to give the Admiralty power, from time to time, to revoke, alter or vary such regulations. I have had frequent occasion lately to comment on the 296th sect. of the Merchant Shipping Act, and I must again direct your attention to the obligations which it imposes on vessels meeting each other so as to involve any risk of collision. The present statute is more comprehensive, and imposes more severe restrictions than former ones; it was, however, utterly impossible for the legislature to have determined or described what should constitute risk of a collision, for that must always be decided according to the circumstances of each case by men of nautical experience; it is a question which the Court itself cannot undertake to decide, but I would suggest to you, Gentlemen, a general consideration upon which we have formerly acted, namely, that we are not to stand too nicely upon how the ships bore to each other—we constantly have conflicting evidence as to whether a vessel was on one bow or the other, or one or more points on this or that bow—but, if you think that any risk appeared, it is then our duty to apply the rules of the statute (*b*). Some part of the argument, as in previous cases, turned upon the supposition that the statute was peremptory that, immediately upon sighting another ship coming towards you, you were to port your helm; but there are no such words in the statute, and common sense requires that when you see a vessel at a considerable distance, a reasonable time must be taken to consider

June 14.

Judgment.

Admiralty regulations of 1852 as to lights still in force.

Risk of collision not defined by the statute, is a question for the Trinity Masters.

(*a*) Vide Appendix, No. I.

(*b*) See *The Ericsson*, p. 38.

1856.

June 14.Facts of the
case.

what course ought to be pursued, and then a prompt execution of what you may think to be right must follow. Both parties are bound to act on the presumption that the statute will be obeyed by the other, the confusion otherwise would be endless. As to the facts of the present case, it appears from the evidence of Clayton, the chief mate, who was in charge of the *Josephine Willis* at the time, that he mistook the light of the *Mangerton*, when first reported, for *Dungeness* light, and thereupon starboarded the helm, and brought the ship one point nearer the wind. About a minute after the helm had been steadied, he, standing on the starboard side of the poop, saw a red light, and, immediately after, a green one, and then knew that a steamer was rapidly approaching; but as the green light, according to his statement, was from three to three and a-half points on his starboard bow, he considered himself justified in keeping the *Josephine Willis* on her course. Presently he lost the green light, and saw that the steamer had ported her helm, and was rapidly altering her course, and then he ordered his helm to be put hard down. When he first distinguished the coloured lights he considers that the steamer was about half a mile distant from the *Josephine Willis*, and that in about two minutes from that time the collision took place. I must ask you whether you are of opinion that the *Josephine Willis* was to blame for starboarding her helm on the occasions on which she is said to have done so; and whether she ought not, under the circumstances, at some time, to have ported her helm? It will also be for your consideration whether the light at her bowsprit end was of a proper description. With regard to the *Mangerton*, the only question is, whether her helm was sufficiently ported when she first distinguished the *Josephine Willis*; the charge against her is, that she ported her helm at too late a period to be of any use.

Barque to
blame for not
having ported.

After consultation with the Trinity Masters, the learned Judge said:—The gentlemen by whom I am assisted are of opinion that the *Josephine Willis* was to blame for not porting her helm when the red light of the steamer was seen; that her own light was not in accordance with the Admiralty regulations for vessels under way, and that this contributed to bring about the collision; if she had shown a proper light, the *Mangerton* might have ported her helm, or stopped her engines sooner: they are of opinion that the *Mangerton* was not to blame. I must pronounce against the *Josephine Willis* in both suits.

F. Clarkson, proctor for the *Josephine Willis*.

Toller for the *Mangerton*.

1856.

June 30.

July 1.

*In the Privy Council.**Present*—The Right Hon. Sir J. L. KNIGHT BRUCE.

The Right Hon. Sir GEORGE JAMES TURNER.

The Right Hon. Sir JOHN PATTESON.

The Right Hon. Sir JOHN DODSON.

THE DUMFRIES, THOMPSON, *Master*.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship—Collision—Rule of the Sea on Vessels approaching.

C. was steering north, with a fair wind from the south-west, D. was on the star-board tack close-hauled; the rule of the sea being in such a case, that C. should go astern of D.: Held, notwithstanding the 296th section of the Merchant Shipping Act, that D. was entitled to keep on her course, presuming that C. would give way to her; and that C. not having seen D. till it was too late, and then ported her helm, which led to a collision, C. was not entitled to recover.

THIS was an appeal from a sentence of the High Court of Admiralty (*a*). This suit had been promoted in the latter Court by the owner of the schooner Christina and Maria, against the owners of the Dumfries, to recover damages for the total loss of the former vessel. The facts are sufficiently stated in the judgment. The Court below condemned the owners of the Dumfries in damages and costs; who thereupon appealed. The 17 & 18 Vict. c. 104, s. 296, enacts, that “whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port, so as to pass on the port side of each other; and this rule shall be obeyed by all steam ships, and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of the navigation, and as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command.”

(*a*) Vide *supra*, p. 63.

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July 1.*Bayford and Forsyth* for the Appellant.*Temple, Q.C., and Addams* for the Respondent.

Judgment.

Conflicting evidence.

General rule of navigation.

Proviso of the Act.

Opinion of the sailing masters.

The Right Hon. Sir J. PATERSON:—This case presents, as many cases of collision do, very considerable difficulties from conflicting evidence as to the distance at which, and the positions in which, the respective ships were first seen by each other; points upon which witnesses are very often found to be inaccurate, without, however, incurring any just imputation of wilful misrepresentation. The evidence distinctly shows that the *Christina* and *Maria* was sailing with a fair wind from the southwest, and steering north; and that the *Dumfries* was sailing on the starboard tack, close-hauled. The general rule of navigation is undoubted, that under such circumstances the *Christina* and *Maria*, having the wind fair, was bound to give way to the *Dumfries*, that is, to go astern of her, as we interpret the expression, to “get out of her way,” which in this case she might easily have done, either by a little starboarding her helm, or even by keeping her course north, if she had seen the *Dumfries* a little sooner than she is said to have done. The *Dumfries*, on the other hand, was entitled to keep on her course, presuming that the *Christina* and *Maria* would, according to the general rule, give way to her. We refer in this case to the general rule; for, assuming the act to apply, on which we do not think it necessary to give any opinion, we think that under the circumstances the general rule cannot be disregarded, having regard to the terms of the proviso in the act. Unfortunately the *Christina* and *Maria* did not see the *Dumfries* until the vessels were so near that there was danger of collision, and then, instead of giving way to the *Dumfries* by starboarding her helm, she ported her helm, and attempted to cross the hawse of the *Dumfries*. Seeing that, the *Dumfries* also ported her helm, but it was then too late to avoid the collision. The *Trinity* Masters were of opinion that the *Dumfries* was solely and entirely to blame, and that for not having ported her helm at an earlier period; and the very learned judge of the Court of Admiralty adopted that opinion. The gentlemen—the sailing masters—whose assistance we have, are of a different opinion, and consider the *Christina* and *Maria* entirely to blame; they think that she might and ought to have cleared the *Dumfries*; that less than half the time that it took the *Christina* and *Maria* to veer from north to east, which they are of opinion she did, would have cleared her had she hauled her wind, and passed to windward by starboarding her helm, which she had the power of doing. Their Lord-

ships, feeling the greatest respect for those who decided this case in the Court below, have nevertheless to determine which of these conflicting opinions is right; and it is not without much hesitation that they have come to the conclusion that the Christina and Maria was to blame in this case, and not the Dumfries. The general rule, as has already been observed, is clear; and notwithstanding that the evidence is conflicting as to the time at which the Dumfries showed her lights, and as to the exact position of the vessels, their Lordships cannot discover that the Dumfries had any reasonable ground whatever for supposing that the Christina and Maria would not give way to, or go astern of her until just before the collision. They consider, therefore, that she was fully justified in keeping her course, and was in no way bound to port her helm earlier than she did. Under these circumstances, their Lordships must advise her Majesty that the judgment of the Court below ought to be reversed; but as one vessel was wholly lost, and the other sustained much injury, and as the case is attended with many difficulties, they are of opinion that no costs ought to be allowed, either in this Court or the Court below.

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July 1.

Appeal sustained;

but no order as to costs.

Stokes, proctor for the Appellant.

Deacon for the Respondent.

—◆—
In the Privy Council.

Present—The Right Hon. Sir J. L. KNIGHT BRUCE.
The Right Hon. Sir GEORGE JAMES TURNER.
The Right Hon. Sir JOHN PATTESON.
The Right Hon. Sir JOHN DODSON.

THE MOBILE, H. PONSONBY, *Master*.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Ship—Collision—Licensed Pilot in charge—Joint Blame of Pilot and Crew—17 & 18 Vict. c. 104, s. 388.

Where a vessel is in charge of a licensed pilot, the owners are not exempted, by the Merchant Shipping Act, from liability for damage caused by the vessel, unless the damage was caused exclusively by the negligence or unskilfulness of the pilot, and there was no blame attributable to the master and crew.

THIS was an appeal from a sentence of the High Court of Admiralty, in a suit promoted by the owners of the brig Fenix, for damage caused to their vessel in a collision with the

July 1, 2.

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July 1, 2.

Mobile, on 19th August, 1855 (*a*). The Court below condemned the owners of the Mobile in damages, whereupon the present appeal was brought.

Addams and *Shee*, Serjt., for the Appellants, contended that as their vessel was in charge of a pilot, whose negligence led to the accident, they were not liable.

Sir *F. Theziger*, Q.C. and *Twiss* for the Respondent.

Their Lordships were assisted by Mr. *John McDonald* and Mr. *James Brown*, sailing masters in the Royal Navy.

July 5.
Judgment.
Mobile ought
to have given
way.

To discharge
owners, blame
must rest on
pilot solely.

In this case
second mate
while in charge
of vessel also
to blame.

The Right Hon. Sir J. PATTERSON:—The Mobile in this case was sailing with a fair wind; the Fenix was on the starboard tack, close-hauled: the Mobile therefore ought to have given way, and gone astern of the Fenix. It was argued that she could not do so, because a schooner, which was also on the starboard tack, had suddenly heaved to and come round, and that the Fenix, although then only at about the middle of the full stream, ought to have done the same. The Trinity Masters and the learned Judge of the Court of Admiralty held that, notwithstanding these circumstances, the Mobile might and ought to have gone astern of the Fenix, and was wholly to blame. The gentlemen, whose assistance we have, are of the same opinion, and their Lordships concur in that view. But there was a pilot on board the Mobile, and it was contended that he was acting in charge of her, and that the danger was occasioned by his negligence, so that the owners of the Mobile are discharged from liability under the 388th section of the Merchant Shipping Act. Now the law is clear, as laid down in the case of *The Diana* (*b*), and *The Christiana* (*c*), that to discharge the owners the pilot must be solely to blame,—that the blame must rest on the pilot, and on him only. In this case the pilot had been obliged to quit the deck for a few minutes. He had left the vessel in the actual charge of the second mate, directing him to keep his course north-east, as they were then steering, and at the same time to keep clear of vessels. He did not tell him in so many words that this direction was subject to any contingencies that might occur. But such was the fair and obvious meaning of his direction. While the pilot was below the second mate was acting in charge of the vessel, and then occurred the circumstance of the schooner suddenly heaving to and going round. The mate did nothing to meet this contin-

(*a*) See p. 67.

(*b*) 1 W. Rob. 131; 4 Moore, P. C. 11.

(*c*) 7 Moore, P. C. 160.

gency, and on the pilot's return to the deck he found the vessel in a very critical position, with reference particularly to the Fenix, and advised the helm to be put hard a-port. Their Lordships, with the advice of the gentlemen assisting them, think that he was wrong in so ordering; but they are also of opinion that the mate had previously done wrong, and brought the Mobile into a critical position, by allowing her to get too close to the schooner and the Fenix which were on a wind. Their Lordships cannot acquit the pilot of all blame, yet they are clearly of opinion that he was not solely and only to blame; and, therefore, according to the decided cases, the owners of the Mobile are not exonerated. Their Lordships will report to her Majesty, that in their opinion this appeal ought to be dismissed with costs, and the cause remitted.

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July 5.

Clarkson and Son, proctors for the Appellants.

W. Rothery for the Respondents.

—◆—

In the Privy Council.

Present—The Right Hon. Sir J. L. KNIGHT BRUCE.
The Right Hon. Sir GEORGE JAMES TURNER.
The Right Hon. Sir JOHN PATTERSON.
The Right Hon. Sir JOHN DODSON.

THE CLARISSE, BRUN, Master.

ON APPEAL FROM THE COURT OF ADMIRALTY OF THE CINQUE PORTS.

ON the 2nd of August, 1855, the Judge of the Court of Admiralty of the Cinque Ports delivered the following judgment in a cause of salvage, in which the facts of the case are sufficiently stated:—

July 4.

This is a cause of salvage promoted by various sets of salvors against certain casks of tallow, linseed, gentian root, and other property belonging to a French brig called the *Clarisse*. The suit was instituted in the Court of Admiralty of the Lord Warden of the Cinque Ports on the 7th of December, 1854, and I agree with the learned counsel who spoke last, that the delay which has taken place is much to be lamented; but that delay I

Judgment delivered by Dr. Phillimore.

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July 4.

It is no case of
derelict,

but a salvage
service of con-
siderable merit.

State of the
vessel.

am satisfied the learned counsel will, on reflection, see has been inevitable, arising from uncontrollable circumstances. It appears that in the first instance the Lord Warden appeared, or rather his office was promoted by a proctor, which is in accordance with the practice of that Court, and the object of which is to secure the property of vessels, much in the same manner as the receivers of droits secure the property of vessels in other cases in this kingdom. The Lord Warden being advised that this was not a case of derelict, the salvors appeared for themselves, and claimed what remuneration the Court might think fit to give. Now in that advice, which the Lord Warden received as to this case not being one of derelict, I entirely agree; I think that the learned counsel who appears for the owners has most correctly stated the law with respect to derelict. There must be no *spes recuperandi*, and no *animus revertendi*. I think it will appear, from the short statement I am about to make, that both these ingredients of derelict are wanting. There arise two questions in this case: first, whether it be a case of derelict at all; and, secondly, to whom salvage remuneration is to be granted. I have already said that I do not conceive this is a case of derelict. The law is clearly laid down by Lord Stowell in the *Aquilla* (a), where he said, "It is sufficient if there has been an abandonment at sea by the master and crew without hope of recovery; I say without hope of recovery, because a mere quitting of the ship, for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment." Now it is sworn distinctly by the master that he went on shore for the purpose of procuring assistance. The same fact is deposed to in the affidavit of one of the salvors. It is also in evidence that the mate did actually return, though after the lapse of considerable time. Now under these circumstances I am clearly of opinion that it is not a case of derelict. It may be, as the learned counsel for the salvors said, that in the allotment of salvage that may make but very little difference. It has not been attempted to be denied that the service, by whomsoever performed, was one of great merit. This vessel struck on the Girdler Sand on the 15th of November last year, and on the 18th she had gone to pieces. Upon the 15th her state was, I think, as described in the affidavits, partly of the master and partly of others, that at seven o'clock, having struck on the sand at 6 a.m., she had five feet and a half water in her hold, and no doubt that when the *Liberty* came to her assistance she gladly availed herself of that assist-

(a) 1 C. Rob. 37.

ance, and the master and crew all left the ship and went on shore. Now it is contended that the salvage remuneration, which it is admitted must be awarded, ought to be divided amongst the following parties, namely, amongst certain smacks and luggers from Colchester, certain vessels of the same kind from Margate, certain vessels of the same kind from Whitstable, and certain vessels of the same kind from Milton. On the other hand it is contended that the only real salvors in this case are, one vessel from Colchester, namely, the *Liberty*, one from Margate, the *Mary*, and certain other smacks, which are mentioned in the affidavit of Mr. Gann, the master of the smack *Mandamus*. Now I am very clearly of opinion, that the pre-eminent reward for salvage in this case is due to the *Liberty*, and for this reason; —it is perfectly clear that it was owing to the agency of the *Liberty* that the lives of all the persons on board the French vessel were saved. It is perfectly true that previously to the passing of a recent statute that would not have been itself a title to salvage reward, though I conceive, coupled with other circumstances, such as the salvage of property, even then, it would have had considerable weight. In the 17th & 18th Vict. c. 104 (the Merchant Shipping Act), there is a distinct provision for such services. The 458th section says, that salvage is to be granted for services rendered by persons “(1) in assisting any ship or boat in distress; (2) in saving the lives of the persons belonging to such ship or boat; and (3) in saving the cargo or apparel of such ship or boat or any portion thereof.” The next section says, “Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid, shall be payable by the owners of the ship or boat in priority to all other claims for salvage.” It is quite true this Act did not come into effect till the 1st of May this year. I have had some little doubt in my own mind as to whether it was applicable to the present case, but inasmuch as it did come into operation before the decision is given, I must consider the principle as binding upon me. I must consider that the *Liberty* coming up at the time, as described in the affidavit of John Glover, which enabled her to save life, is entitled to a far larger sum of salvage than the other smacks and vessels. The evidence of John Glover, the master of the *Liberty*, has been read by both the learned counsel, and it is not necessary to go through it again. The point will not be disputed. He says, “There was a leak, and the pumps had been set to work.” He then states, “That the crew were got on board the smack,” and goes on to say, “The smack *Mandamus* then came up, and this deponent went on board of her and entered into an agreement

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Various parties
of salvors.

Salvage of life
of pre-eminent
merit.

Claim of the
Liberty.

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Agrees to shut
in with the
Mandamus.

with the captain to *shut in* with him, and he then left some portion of his crew on board of her in charge of the brig, and with orders to board her as soon as the sea would permit." The claim of the next vessel to be considered will be that of the *Mandamus*, and it is perfectly clear from the affidavit made by the master of the *Mandamus*, which substantially confirms the affidavit of John Glover, that they were the first persons who were in possession of this ship, and who, as they swear, without the assistance of the other smacks, would have been able to preserve all the valuable cargo. They agree, in what is called in the phrase of that part of the country, to "*shut in*," that is, to shut out all other persons and include themselves only, to undertake the whole management of the affair. There is distinct evidence as to what the other vessels were with whom they engaged, a list of them is given, and the learned counsel for the owners contends that they are alone entitled to salvage. It is sworn, that they would have been sufficient to preserve the whole of the cargo in this case, and that not only no assistance was given, but positive mischief was done by the interference of others. It has been said that there is a known rule in this Court that there attaches to priority of service a right, which right excludes all other persons from interfering in any way with the right acquired by priority of service. The Colchester men are charged with having sinned against that rule, not by the violence of their conduct, but by their intervention; but the Margate men are charged with violating it both by their intervention and by the violence of their conduct. The Court finds itself in some difficulty as to this part of the case. In the first place, it is evident that one of the most material parts of the case is wanting, namely, the evidence of Lloyd's agent; and secondly, there is a large *de facto* proportion of the casks salvaged by those who are accused of unnecessary intervention, namely, by the Margate and the Colchester men. The Margate men alone, according to a statement, the truth of which is not denied, but which is admitted on both sides, appear to have saved 1,638*l.* 13*s.* 2*d.* worth of property. In the next place, it must be borne in mind that though these salvors, it must be admitted, were in prior possession, yet they were not in continuous possession. The state of the weather at the time, and the state of the sea rendered that impossible. It would be carrying the doctrine further than I have seen it done, were I to hold that where the services are necessarily intermittent, it is not competent to other persons in the interim to come in and act as salvors. It must always be a question of circumstances. It is not difficult to see that such a doctrine as that which is here contended for, if carried to the extreme, might

Alleged unnecessary
intervention of
other salvors.

These latter
were, however,
de facto salvors;

and the first
salvors were
not in continuous
possession.

lead to the loss of the property itself. Lastly, it must not be left out of consideration that the vessel was at this time actually going to pieces, and that she did go to pieces on the 18th. Now, finding my way as I best can to what I conceive to be the justice of this case, I intend not wholly to exclude the Margate men or the Colchester men, but to mark, especially in the case of the alleged Margate salvors, the opinion of the Court with respect to their conduct, by a considerable diminution of the salvage awarded to them as compared with that which the Court will think it its duty to give to others. It is admitted in this case that the whole amount of the property upon which the Court has to operate is 6,050*l*. There has been no sum stated at which the action has been entered, which appears unusual, and some complaints were made that bail was not taken. I am not aware whether bail was offered or refused, but I assent to many of the observations which have been made by the learned counsel for the owners, with respect to the improvement which might be made in the Admiralty Court of the Cinque Ports, and which I hope to have the honour of doing, namely, assimilating the proceedings here more to those of the High Court of Admiralty than appears at present to be the practice. At the same time the Court naturally looks more to substantial, though rough justice, than to the formality of the proceeding. I am aware of the advantage of introducing an act on petition, which is simple, economical, and furthers the ends of justice. I purpose to allot out of the sum of 6,050*l*. the sum of 1,280*l*. I purpose to allot to the Liberty, the salvor of the lives of these parties, 460*l*.; to the other Colchester smacks 320*l*.; to the Whitstable smacks 320*l*.; to the Margate smacks 100*l*.; to the lugger Mary 30*l*.; and to the Milton smacks 50*l*. I think that will make the sum of 1,280*l*.

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Misconduct of
certain salvors,
marked by
diminution of
salvage.

Dr. Jenner. To the Liberty 460*l*.?

The Court.—Yes; separate from the other Colchester men. The sum is considerable; though this vessel was not a derelict, it was everything but a derelict. The season of the year, the state of the weather, the promptitude of the service, and the efficiency of the succour, are all circumstances which render this a case of salvage of a most meritorious character.

From this judgment the salvors, with the exception of the Liberty and other Colchester boats, and the Mary and the Milton boats, appealed to the Judicial Committee when the decision appealed from was affirmed, with a slight variation as to the

Appeal to the
Privy Council.

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apportionment, but without costs, in the following judgment delivered by

Judgment.

Indisposition
of the Court of
Appeal to
interfere with a
judgment of the
Court below ;

especially in
salvage cases,
unless the judg-
ment appealed
from is clearly
erroneous.

The Right Hon. Sir J. L. KNIGHT BRUCE :—Considering the distress and danger in which the vessel was placed, and the meritorious nature, so far as some of the salvors were concerned, of the services rendered, their Lordships would, in all probability, had the case come originally before them, have been disposed to allow a greater amount of total remuneration. It is, however, a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a Court of Appeal to interfere upon a question of mere discretion. On general grounds therefore their Lordships are not disposed to increase the amount given in the Court below. The Margate smacks, to which 100*l.* had been allowed, appeared, so far as their Lordships could form a judgment, to have misconducted themselves greatly, and to have done more harm than good; and had they not been joined in the appeal with the other Appellants, to whom no such observation applied, their Lordships would have been disposed to take away one half of that sum. Their Lordships, however, decline to interfere in that case also. With regard to 640*l.*, composed of two sums of 320*l.* each, one of these sums should be allotted exclusively to the nine boats which arrived at the wreck on the 15th of November, consisting of seven boats from Whitstable, and the Prince of Orange and the Unity; the other 320*l.* must be divided, per capita, between the remaining Colchester and Whitstable boats, eleven in number. There will be no costs of the appeal.

Rothery, proctor for the Appellants.

Tebbs for the Respondents.

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August 2.

The High Court of Admiralty.

THE CLEOPATRA, W. PATON, *Master*.

Steam ships—Collision—Rule of Merchant Shipping Act as to porting helm.

The C. steamer, steering E. $\frac{1}{4}$ N., on a clear night in the Sea of Marmora, saw the bright and green lights of the S. three points on her starboard bow, distant at least three miles. She starboarded her helm, and then put it hard to starboard. The S. having ported her helm when she made out the C., a collision ensued. Held, that the vessels were meeting each other within the meaning of 17 & 18 Vict. c. 104, s. 296, and the C. was solely to blame for the collision, in not having ported her helm.

THE Simla, a screw steam vessel, of the burthen of 1,177 tons, with two engines of 315-horse power each, belonging to the Peninsular and Oriental Steam Navigation Company, and the Cleopatra, a steam vessel, of the burthen of 1,452 tons, propelled by two engines of the collective power of 250-horses, the property of the Canadian Steam Navigation Company, came into collision with each other in the Sea of Marmora, about forty miles to the westward of Constantinople, at 1.50 a.m. on the 14th of August last. The Simla was bound, in ballast, from Kosloo Bay, in the Black Sea, to Beyrout, calling at Scutari. The Cleopatra left Malta with troops, having the sailing transport Talavera, of 700 tons burthen, in tow, bound to Constantinople. The weather was fine and calm. The Simla alleged that she descried the Cleopatra distant about two miles, whereupon she ported her helm, and afterwards put it hard a-port, and stopped her engines. The Cleopatra continued to approach her rapidly, and on coming within hailing distance, with her helm hard a-starboard, she was loudly hailed to port it, which she did at the last moment. The engines of the Simla were then turned ahead, in order that the Cleopatra, if she had answered her helm quickly, might have gone astern of the Simla; but the helm of the Cleopatra was shifted too late to make any sufficient alteration in her course, and she almost immediately ran stem on into the Simla, and did her considerable damage. She attributed the collision to the Cleopatra, on first coming in sight of the Simla, starboarding instead of porting her helm. The Cleopatra pleaded that she discovered the Simla distant from three to four miles, bearing about three points on her starboard bow, whereupon she first starboarded her helm, and afterwards put it hard a-starboard. That the Simla neared

Facts of the case.

Statement of the Simla.

Statement of the Cleopatra.

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the *Cleopatra* at the rate of nine knots an hour, but in a direction to pass well clear of her to starboard, and then suddenly, when too late, ported her helm and attempted to pass ahead of the *Cleopatra*, thereby rendering a collision inevitable. The *Cleopatra's* helm was immediately put hard a-starboard and her engines stopped, but before they could be reversed the two vessels came into contact, in consequence of which the *Cleopatra* sustained considerable damage. She denied that her helm was at any time ported, and asserted that she did everything in her power to avoid the collision. Cross actions were entered by the respective parties.

The Court was assisted by Captains *Ellerby* and *Were*.

Jenner and *Deane* were heard for the *Simla*.

Addams and *Twiss* for the *Cleopatra*.

Judgment.

Was the *Cleopatra* justified in starboarding?

Terms of the Act.

Meaning of those terms.

DR. LUSHINGTON, addressing the Elder Brethren, said :—Gentlemen, I will first request your attention to the case of the *Cleopatra*, and the question which I should wish to submit to your consideration will be this, whether, taking all the facts to be true as represented on behalf of the *Cleopatra*, she was justified in adopting the measure which she did adopt—namely, starboarding her helm? In order to ascertain this question, it appears to me desirable, in the first instance—looking at the facts which are stated, and I may almost say admitted, on both sides—to see whether this case falls within the provisions of the Act of Parliament, or whether there is any reason to make it an exception therefrom. The Act of Parliament directs that “whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision,” the helm shall be ported. Therefore the first question for you to determine is, whether you consider these two vessels to have been so meeting each other as to come within the true construction of the statute? According to my view of the statute, the meaning is this—whenever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course so that there is reasonable probability of collision, it is their duty, unless there be some impediment, to obey the provision of the statute. I cannot help thinking, assuming it to be true that the *Cleopatra*

saw the green and white lights of the Simla two points on her starboard bow, the courses of these vessels being directly in opposition the one to the other, the course of the Simla being W. $\frac{1}{2}$ S., and the course of the Cleopatra E. $\frac{1}{2}$ N., I cannot help thinking that this is a case that does fall within the intention of the Act of Parliament. If, indeed, instead of being seen two points on the starboard bow, the vessel had appeared to be five or six points on the starboard bow, then I should consider that these two vessels were not *meeting* each other—which is the term used in the Act of Parliament—but were rather *crossing* each other, in which latter case other and different considerations would apply. According to the statement which is made on behalf of the Cleopatra, the following occurrences took place:—"James Smith reported a light on the starboard bow, and at the same time deponent himself saw two lights, to wit, a bright and green light, about three points on the starboard bow of deponent's ship, and distant about three or four miles, and which deponent immediately knew to be the masthead and starboard lights of a steam ship." The Act of Parliament states that the provisions which I have read to you shall be obeyed, unless there be circumstances which render a departure from the rule necessary in order to avoid immediate danger; therefore, the question for your consideration is, whether by possibility it can be said that the circumstances of this case rendered a departure from the rule necessary to avoid immediate danger? That case does sometimes arise when two vessels are very close to each other, and it is impossible to comply with the provisions without danger being incurred—that is a clear exception. When two vessels are seen on a fine night such as this—at the distance of two or three miles from each other—it appears to me scarcely possible to say that the starboarding of the helm was requisite in order to avoid immediate danger, because I apprehend if both vessels had obeyed the Act of Parliament, the collision must of necessity have been avoided. If both vessels saw the green light at one and the same moment, and both starboarded their helms, in that case there would be no danger of collision; but if masters of ships are to feel themselves at liberty to starboard merely because they see the green light, I fear there must sometimes happen what occurred in this case. The Cleopatra saw the green light of the Simla before the Simla saw the green light of the Cleopatra. The Cleopatra would starboard because she saw the green light; the Simla, not seeing the green light, but only the white light, might port her helm. I am afraid this must happen both from the various sizes of vessels, the condition of the lamps, and even the state

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The vessels were "meeting" within those terms.

Secus, if the Cleopatra had seen the green light five or six points on her starboard bow.

Were the circumstances such as to render a departure from the rule necessary?

Danger of starboarding on seeing the green light.

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of the oil with which they were supplied. The Act of Parliament not having been complied with, the only question I can properly put to you is, whether the circumstances of the case were such that, in order to avoid immediate danger, it was necessary for the *Cleopatra* to starboard her helm? With regard to the case of the *Simla*, it does not appear to me I can put any other question than this, whether you think there was any delay on the part of the *Simla* in taking the measures which the Act prescribed?

Captain *Ellerby*.—We concur in opinion that the blame of the collision entirely rests upon the *Cleopatra*.

The Court pronounced against her in both actions.

Middleton, proctor for the *Simla*.

F. Clarkson for the *Cleopatra*.

THE DESPATCH, J. COOPER, *Master*.

Collision—Schooner close-hauled on port tack—Steamer running ten knots an hour at night in a narrow channel.

A steamer going ten knots an hour on a dark night up the Horse Channel, at the entrance of the Mersey, sees a sail three points on her port bow, less than half a mile distant. She ported her helm, but did not ease her engines.

Held, that the steamer was in fault for the collision which ensued, for not having stopped or eased her engines when she made out the other vessel, and that maintaining such a rate of speed was, under the circumstances, unwarrantable.

THE schooner *Glide*, of the burthen of 142 tons, proceeding from Amlwch, in ballast, to Liverpool, and the steam-ship *Despatch*, of the burthen of 294 tons, with engines of 120-horse power, bound from Dublin to Liverpool, came into collision with each other, at 12.25 a.m. on the 14th of November last, about one mile from the North-west Lightship, at the entrance to the river Mersey. The direction of the wind was S.E., and the weather, according to the schooner, was hazy, but, as represented by the steamer, dark and cloudy, without haze or mist. The course of the schooner was S.S.W.; of the steamer E.S.E. The

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schooner alleged that she was close-hauled on the port tack, and on descriing the steamer on her starboard quarter, distant a mile, she immediately exhibited a light, and kept steadily on her reach, expecting that the steamer would pass under her stern, which she might easily have done. The steamer, however, which was proceeding at the rate of nine knots an hour, approached the schooner, without any alteration in her course, until within the distance of about three times her own length, and then, instead of going astern, attempted to pass ahead, and thereby rendered a collision inevitable. The schooner put her helm hard a-port, but the steamer ran athwart her hawse, and struck her such a violent blow that she afterwards foundered. The steamer represented that she saw the schooner three points on her port bow, distant from a quarter to half a mile. The schooner had no light exhibited. The helm of the steamer was ported, and then put hard to port, and she payed off several points, but the schooner ran stem on into her. She charged the schooner with not keeping a proper look-out, not showing a light, and not porting her helm in sufficient time.

The Court was assisted by Captains *Ellerby* and *Were*.

Addams and *Twiss* were heard for the schooner.

Bayford and *Spinks* for the steamer.

DR. LUSHINGTON, addressing the Elder Brethren, said :— Judgment.
Gentlemen, it is not my intention to trouble you with the details of this evidence, but the first question which I would submit for your consideration is one, which it appears to me has not been so much discussed as the merits of it deserved, viz., whether the *Despatch*, being a steamer, on a night admitted to be dark, was justified in coming up the Horse Channel at the rate of ten knots an hour—a rate which, according to her own evidence, was so rapid that, after the collision had occurred, they were not able to stop her for two miles? Secondly, I shall submit for your consideration whether it was not the duty of the steamer to have stopped in time in case of danger or difficulty (and especially her duty, being a steamer) to avoid vessels which she might meet in that immediate locality? Her master deposes as follows :—“ When I first saw the *Glide*, I should judge she was two or three points on our port bow. It was so dark that I could not make her out, even with the aid of the glasses I had with me; neither could I judge her distance from

Rate of speed
of steamer.

Evidence of
her master.

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Conduct of the
schooner.

Does the Act
apply?

And was she
too late in
porting?

Opinion of
Trinity Mas-
ters :—steamer
ought to have
stopped.

us accurately, but I should think she was about a quarter to half a mile distant. I could not make out which way she was standing. As soon as ever I saw the Glide, I told the man at the wheel to put the helm to port, and then, in about thirty seconds, to put it hard a port." The same witness on interrogatory, said,—“The way of the Despatch, when going at full speed, could not be stopped entirely before she had run two miles, without reversing, or one mile, the engines being reversed.” With regard to the case of the Glide herself, it has been contended before the Court, first, by Dr. Bayford, that the evidence of their witnesses is inconsistent; and, secondly, by Dr. Spinks, that this case necessarily comes under the Act of Parliament, and that the Glide did not do what she ought to have done, looking to the contents of that statute, and therefore is not entitled to recover. With respect to the inconsistency of the evidence, no doubt in the particulars pointed out by Dr. Bayford he is perfectly correct; but I must confess to you there are no greater discrepancies than naturally might have been expected. When I read the evidence of John Williams, when I find him in five instances speaking of different events, and with respect to each using a quarter of a minute, though I believe he did not intend to deceive the Court, yet I think it is impossible to say that his is a remarkably intelligent statement, and therefore we may leave him out of the question. He does not appear to me to prove the case on behalf of the Glide, or to establish anything of importance. Assuming for the moment that the Glide should be subject to the provisions of the Act of Parliament, according to her own statement she showed a light as soon as she perceived the steamer, and afterwards, when she found the steamer close on her, she ported her helm. If you think there was negligent delay in porting the helm, that she ought to have adopted that measure at an earlier period, and that there was a want of diligence in the performance of that duty, you will hold her to blame; on the other hand, if you consider she did all that could reasonably be expected under the circumstances, then she is not to blame.

Captain *Ellerby*.—We are of opinion that no blame attaches to the schooner; that the blame rests entirely on the steamer; that it was her duty, on first observing the Glide, to have eased and have stopped her engines, not to have gone on in the reckless manner she did, especially in a narrow channel like Horse Channel. We are also of opinion that there was great want of humanity on the part of the master of the steamer in not having stopped his engines immediately to see to the safety of the crew.

He must have known some accident had occurred that was very dangerous.

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The COURT.—Of course the judgment will be against the Despatch. I have only to add, that I concur in all that the Trinity Masters have said as to the want of humanity in not going back to look after the crew of the Glide. I had made up my mind, if the Trinity Masters had been of opinion that the Glide was to blame, that I would not have given the owners of the Despatch their costs.

F. Clarkson, proctor for the Glide.

Tebbs for the Despatch.

THE SOUTH SEA, W. S. BRETT, *Master*.

The South Sea and the Clara Symes came into collision in Hobson's Bay, in Victoria; the latter was so much damaged that her master thought it better to sell her there than to have her repaired. Subsequently, the South Sea was arrested by warrant of this Court, and condemned in a suit for damage. On reference as to the amount, the owner of the Clara Symes claimed the value of his vessel previous to the collision, less the amount produced by her sale: he also claimed upwards of 3,000*l.* for freight which she might have earned on a cargo from Moulmein to England. The Registrar's Report found that the master had, in selling the vessel, acted as a prudent owner, if on the spot and uninsured, would under the circumstances have done, and that her owner consequently was entitled as for a total loss; that though the charter-party for the voyage from Moulmein to England had been sent out before the collision occurred, yet it was by no means clear that the Clara Symes would have been in a condition, independently of the collision, to have carried out that charter-party, and that her owners were not entitled to the freight which might have been earned. The Report gave interest at the rate of 4 per cent. per annum on the amount pronounced for, from the date of the collision until paid.

This Report was not objected to, but on an application to the Court, it directed the costs occasioned by the claim for freight to be paid by the owner of the Clara Symes, the remainder by the owners of the South Sea.

THIS was originally a cause of collision, promoted by the owner of a vessel called the Clara Symes, against the South Sea. It appears that the Clara Symes, whilst lying at her moorings in Hobson's Bay, in the colony of Victoria, was, on the morning of the 1st of March, 1853, run foul of by the South Sea, and sustained such considerable damage, that her master was induced to sell her, deeming it to be more for the interest

August 8.
Facts of the
case.

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of his owner to do so, than to have her repaired at Melbourne. No proceedings were taken against the South Sea in the Colonial Court, but upon the return of that vessel to this country, Mr. Thomas Ayre, of Bristol, the owner of the Clara Symes, arrested her by warrant from this Court, in a cause of collision. And on the 24th of February, 1855, the Court pronounced in favour of the Clara Symes, and referred the accounts to the Registrar and Merchants to assess the damages. An account was subsequently brought in by the owner of the Clara Symes, in which he claimed the whole value of his ship as she was before the collision, and the expenses occasioned thereby, and gave credit for the amount realized by the sale of the ship and stores. He also claimed a sum of 3,050*l.* for the freight, which it was stated she would have earned for the conveyance under a charter-party, of a cargo of timber from Moulmein to England. These and other items will be found in the Schedule to the Report. The case was very strongly contested before the Registrar and Merchants: it occupied several days; and amongst the witnesses examined before them, *vivâ voce*, were Mr. Ayre, the owner of the Clara Symes, Captain Brett, the master of the South Sea, and Captain Nicholas, a merchant captain, who had surveyed the Clara Symes after the collision. It was contended on the one side that the abandonment of the Clara Symes was altogether unnecessary, and had been done with a view to defraud the underwriters in this country; that she might have been easily repaired at Melbourne, and put into a condition to prosecute her voyage; that the South Sea, which was in a much worse condition than the Clara Symes after the collision, had been so repaired, and returned to this country. On behalf of Mr. Ayre, it was said, that the repairs could not have been done at Melbourne; that commercial affairs were at the time in great confusion; that money could not be borrowed on any conditions; that the master had neither money nor credit, and that he was unable to raise money even on bottomry of the ship to repair her. That the South Sea, after the collision, in consequence of the master's inability to repair her, had been laid up as a store ship, and that it was only after a considerable time, and with the assistance of his relations, who were resident in Australia, that Captain Brett had succeeded in repairing her. And it was strongly urged that the question was whether the course taken by the master of the Clara Symes was that which a prudent owner, if on the spot and uninsured, would have taken; and if so, that the owner must recover for a total loss. As to the freight, it was stated by Mr. Ayre, that he had entered into a charter-party for the conveyance of a cargo of timber from

Moulmein to England by the Clara Symes, and had sent it by post to the master of that vessel before the collision occurred, but there was no evidence to show when it reached him, or whether it ever reached him at all. And it was contended, in opposition, that even before the collision, the Clara Symes had been hired to carry cargo and passengers from Melbourne to London, and that consequently she was not in a condition to have carried into effect the charter-party for the conveyance of a cargo of timber from Moulmein to England. The principal authorities referred to were *Manning v. Irving*, 1 Common Bench Reports, 168, and 6 Common Bench, 391; *Moss and others v. Smith and another*, 9 Common Bench, 94; *Somes v. Sugrue*, 4 Carrington & Payne, 276 and 282; and *Allen v. Sugrue*, 8 Barn. & Cresswell, 561. The Report of the Registrar and Merchants bears date the 17th of June, 1856, and gives the following as the ground upon which their Report was based. They say—

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“(1) That, looking to the extent of the damage sustained by the Clara Symes in her collision with the South Sea, to the extreme difficulty that existed at the time in raising money at Melbourne on bottomry even of sound vessels, looking also to the fact that the Clara Symes was not a first class vessel, and was, as appears by the evidence, unsound in parts, and that moreover her owner was unknown and consequently without credit at Melbourne,—we consider that the master exercised a wise discretion in abandoning his ship—we think, that under the circumstances a prudent man, if on the spot and uninsured, would probably have adopted the same course, and have declined to repair his ship. And we are at a loss to conceive on what grounds it was alleged that the abandonment was made, with a view to defraud either the underwriters or the owner of the South Sea, seeing that the Clara Symes does not appear to have been insured to her full value, and that her owner could not at the time of such abandonment have known that the South Sea would have returned to this country so as to have enabled him to institute proceedings against her.

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“(2) That, as regards the charter-party for the conveyance of a cargo of timber from Moulmein to this country, it appears from the evidence produced, that the master of the Clara Symes had abandoned his voyage, and had laid on his vessel for London long before the said charter-party could have been received by him, if indeed it ever reached him at all. That it is consequently very doubtful whether the master could have carried out the said

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charter-party, even had the collision in question in this cause never occurred. That, on the other hand, there is no evidence to show whether any, and if any, what profit would have been realized by the owner on the return voyage, had the vessel come direct to this country. In lieu, therefore, of the claim for freight, we have thought fit to allow interest at the usual rate, on the amount reported due from the 1st day of March, 1853, the day of the collision. At the same time we would observe, that we do not impute any blame to the owner for having made a claim for the amount of freight in question, inasmuch as he might very possibly have conceived himself to be justly entitled thereto."

The following is a copy of the Schedule referred to in the Report:—

	Claimed.				Allowed.			
	£	£	s.	d.	£	s.	d.	
No. 1. Value of ship		8,870	0	0	6,652	0	0	
2. Charter to bring home a cargo of } timber from Moulmein	4,400							
Less wages of crew and charges on } cargo	1,350							
	3,050	0	0		..			
3. Expenses incurred after the collision, and in consequence thereof, as set forth in the ex- hibit annexed to the affidavit of Casbert James Thomas	1,449	19	2		880	11	5	
	13,369	19	2		7,532	11	5	
Deduct proceeds of ship and stores	3,002	4	5		3,066	13	3	
	10,367	14	9		4,465	18	2	
4. Two per cent. on Exchange	30	19	5		30	19	5	
5. Messrs. Duncan and Dunbar's charges	37	18	6		37	18	6	
6. Ditto ditto	33	18	2		33	18	2	
7. Ditto exchange	27	13	7		27	13	7	
8. Costs of maintaining crew after the collision..	240	0	0		201	0	0	
9. Two per cent. on exchange	0	17	5		..			
10. Surveyor's charges omitted	13	13	0		..			
11. Insurance on South Sea	126	4	0		..			
12. Arranging accounts	6	6	0		6	6	0	
	10,885	4	10		4,803	13	10	

With interest at the rate of 4 per cent. per annum from the 1st day of March, 1853, until paid.

The Report was not objected to by either side, but more than one half the claim having been struck out, the Court was now asked to condemn the owner of the *Clara Symes* in the costs of the reference to the Registrar and Merchants.

Addams for the *South Sea*.

Jenner for the *Clara Symes*.

DR. LUSHINGTON said:—I am of opinion that justice will be done in this case by the owner of the *Clara Symes* paying all the costs attending the claim for freight. The rest of the costs must go in the usual way, and must be paid by the owner of the *South Sea*.

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Judgment.

THE GLASGOW, OTHERWISE YA MACRAW.

*Ship—Sale by Master in foreign Port without express authority
—Circumstances necessary to its validity.*

The *G.* reached Savannah in March, 1855, laded a cargo of timber, and in April, before she cleared the mouth of the river, drove ashore in a hurricane; she was got off, discharged her cargo, and was surveyed; extensive repairs were found necessary; neither the owner, who lived at Gloucester in England, nor the master had any credit, the ship was uninsured, and money could not be raised on bottomry;—under these circumstances the master sold her without any express authority from the owner; she was repaired by the purchasers, sailed to Liverpool, and was arrested there at the suit of the former owners.

Held, under the circumstances, that the sale was a valid one, and the ship was decreed to be restored with costs and demurrage; but, in such cases, the burden of proof lies upon the purchaser, unless the sale took place under the decree of a competent Court.

THIS was a cause of possession, brought by Charles Jones, of the city of Gloucester, sailmaker, the former sole owner of the barque or vessel *Glasgow*, otherwise *Ya Macraw*, whereof Richard Ward was formerly master, against the said barque, her tackle, apparel and furniture, and the freight due for the transportation of cargo laden on board; and against John D. Delanney and others, of Savannah, in the state of Georgia, merchants.

July 18,
and
August 1.

After the sale at Savannah, as stated in the judgment, she was repaired by the purchasers, at a cost stated by them to be 17,362 dollars, and sailed to Liverpool, where she was arrested at the suit of her former owner.

The cause was argued by *Robinson* and *Bayford* for the foreign purchasers.

By *Addams* and *Twiss* for the former British owner.

The facts of the case are sufficiently detailed in the judgment.

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Judgment.

Master generally no authority to sell the ship; necessity only will justify it.

Burthen of proof on the purchaser.

Facts of the case.

Master without credit.

DR. LUSHINGTON:—The Court has in this case to consider whether the sale by the master of a British ship in a foreign port to a foreign purchaser is valid, such sale having been made without any express authority from the British owner. I have so recently declared my opinion as to the law generally applicable to cases of this kind, that I need not again advert to the authorities (a). The general principle sanctioned by maritime law is, that the master has not, as master, any authority to sell; that necessity only will justify such a sale, and render the transfer valid. The question then is, as to the existence of an adequate necessity. This necessity is to be judged of by all the circumstances: I will mention some of them. 1. The state and condition of the vessel; 2, consequences of not proceeding to sell; 3, facility of communication with the owner; 4, the resources of the master, or the total absence of all resources; 5, in some degree, too, the power and means of the owner to avert a sale. I conceive that the law inclines against sales of this description, and throws the burden of strict proof upon the purchaser, for it is his duty to ascertain the authority under which the master acts, or the circumstances which render a sale imperatively necessary; and from this proof, save where there has been a decree by a competent Court, no formality can release him. It appears from the evidence in this case that this ship was purchased in February, 1854, by Mr. Jones, a sailmaker of the city of Gloucester, for 2,500*l.*, and that in November he sent her under a charter-party, which is not produced in this case, first to St. Thomas's, and then to Savannah. The ship was built in 1836, and, according to the letter of the master, dated December, 1854, from St. Thomas's, he considered her to be a good ship, but in want of repair. The vessel reached Savannah at the end of February or beginning of March, 1855, and by the middle of April she had taken on board her cargo of timber, and had a deck load. During her stay at Savannah some expenses were incurred, and those expenses amounted to the sum of 446*l.*; there is no evidence that Mr. Jones supplied the master with any credit whatever, in any shape, for defraying the expense of any necessary outlay. The money was furnished by Messrs. Hunter and Ganuall, who were not, so far as this case shows, originally the agents of Mr. Jones: how they came to be employed is rather left to inference than shown by evidence; the best conjecture probably is, that they were not at first the agents of Mr. Jones, but of those interested in the cargo; or, as the master must needs have applied to some mercantile house, he

(a) *Segredo*, otherwise *Eliza Cornish*, 1 Eccl. & Adm. Rep. 36.

selected them himself: for this sum of 446*l*. Messrs. Hunter and Gannell drew a draft upon Mr. Jones. The vessel being thus prepared to prosecute her voyage, reached the mouth of the river, the master still remaining behind in the city. On April 21st, unfortunately, she grounded on a mud bank in consequence of a hurricane, and though she was got off, she again drove ashore, from which position of peril she was finally rescued and brought to anchor under the pilot's orders. The master came down from Savannah, but was prevented from going to sea, the crew having come off in a body and refused to do so, believing the vessel not to be seaworthy: this fact is stated in the protest. Under these circumstances the master had necessarily recourse to a survey, and he appears to have employed very proper persons for that purpose, for the survey was made by two of the port wardens, who are duly authorized for such purposes, by a representative of Lloyd's agent and by a master shipwright; and on April 27th the two survivors, the others having been unfortunately drowned, reported that they found the vessel leaking badly, which rendered her unfit in her present condition to perform the voyage; they recommended her to be discharged and taken into the dry dock for further examination. A very long delay occurred before anything could be further done with respect to this ship, or the measures advised by the surveyors carried into execution. The difficulties which occasioned this delay are not stated with any great precision, but I see no reason to impute any negligence in this respect to the master, much less to cause me to entertain any suspicion of his integrity. First, he was unable to get her into any dock at all; and secondly, when he did get her into the floating dock, she was so leaky that nothing could be done. The cargo having been discharged, a new survey was made on June 20, by Mr. Hone, the port warden, who had surveyed her in April, and the ship masters, and they state in detail very extensive repairs which they deemed to be necessary. On June 23, a fresh survey was made by no less than six persons—two port wardens, two masters, a master shipwright, and Lloyd's agent,—and they reported that it would cost more to repair her and make her seaworthy than she would be worth afterwards, and they recommended that she should be sold at auction for the benefit of all concerned. It does not appear to me that the effect of this report is materially diminished from the circumstance of another port warden and a master shipwright being of opinion that by placing sister kelsons in lieu of taking the floor timbers out, such repair would make her seaworthy to carry a cargo of lumber to London; such a species of repair would probably be less expensive, but to what extent I

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Ship goes ashore.
Crew refuse to proceed in her.

Ship surveyed, and recommended to be unladen.

Surveyors recommend that she be sold.

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Did the facts
justify the
sale?

Master states
the vessel to be
rotten.

He had a
greater interest
in bringing her
home than in
selling her.

What was the
amount of
freight to be
earned?

have no means of judging. The result, in my judgment is, looking at the persons who made the survey, and to all the circumstances, that, so far as regards the state and condition of the vessel and the cost of repair, credit is justly due to the report; but whether the consequences of this state of things ought to be a sale of the vessel is subject to other and different considerations. If a vessel is utterly incapable of repair, there can be no reasonable doubt that she must be sold; but if capable of repair at all, the propriety and validity of a sale must be judged of by other considerations. This evidence is further strengthened by a letter written by the master to his owner, dated May 26, 1855, in which he states that the Glasgow's bands and sundry other parts of her are as rotten as they possibly can be; and in a previous letter of May 18, he says, "the vessel is as rotten as a pear, you can pick her to pieces with your finger and thumb; the new deck and ceiling was put in her just to sell her; they knew what they were about. I don't think that is anything more than the sheathing that is holding her together." I see no reason to distrust this statement of the master; so far as I can judge, it would have been more for his interest to have repaired her and brought her home; I have heard no cause assigned why this would not have been the probable inclination of the master and the ordinary course that a master would pursue. Against that evidence there is nothing opposed but an affidavit of three of the sailors, and these affidavits are deprived of all weight by the fact of two of the persons who swore them having sworn in the protest that the crew came off in a body and refused to go to sea in the ship, in consequence of her having become very leaky even in the still muddy water she was in. As to the carpenter, on 29th June, 1855, he swore that he had closely examined the ship and that she was decidedly unseaworthy. I think, then, that one of the circumstances essential to the validity of a sale by a master, namely, the unseaworthy state of the vessel, and the very large expense which would be indispensable to restore her, is proved; but that, as I have already observed, is only one circumstance, for it might be, from the amount of freight or other reasons, that it would not be to the advantage of the owners that the vessel should be sold. By this time, June 20th, a very large expense had been already incurred. I have no means of judging how far such expense was absolutely necessary. The sum of 4,000 dollars certainly seems large, but then I am to recollect that there was the expense of getting the vessel off the bank, the maintenance of the crew, the survey, and more especially the charge made for the docks, the precise amount, however, is not material. Now, let me consider what would

have been the probable expense of repairing this vessel and sending her to sea. The estimate for the repairs is 11,600 dollars; assuming that the repairs had been done upon the more economical proposition mentioned in the report, still, with all the contingent expenses, I think it would have been impossible that she would have been ready for sea under 12,000 dollars. We shall presently see that a sum of not less than 3,500*l.* must, in some way, have been provided for; now the question arises whether it is possible that such a sum of money could have been raised at Savannah, or was likely to be transmitted from England, or if not, what the consequences would have been to the owners provided the ship had remained in her unrepaired state. Messrs. Hunter and Gannell, on April 28th, wrote a letter to Mr. Jones, and informed him of the disaster that had happened to the ship, and they add, that "as the disbursements of the vessel may be heavy, we presume that you will open a credit for us in New York, or, if you prefer it, we could reimburse ourselves by a bottomry bond; we wish your views on the matter and wait your instructions." Mr. Jones was already informed that he had been drawn upon for 446*l.* There was also another letter written about the same time. It does not appear when precisely these letters were received; but there was one letter, and one letter only, written by Mr. Jones to Messrs. H. and G., and that bears date June 1st. Their letter of April 28th must have been received at Gloucester before May 18th, because on that day Mr. Jones writes a letter to the master and tells him that the Glasgow is totally uninsured; he says he must defer about a letter of credit till next mail. "Do no more than make her tight to bring her home; if the ship be ready before I send out funds, you will not wait a minute, but give a bottomry bond on the ship." On May 22nd Mr. Kendall, who was the agent of Mr. Jones, writes a letter to the master, in which he says, "You hint at the possibility of condemnation; I cannot believe such a thing likely in the circumstances of the case, except the information from England had induced you to do it. Get the ship in sufficient order to come home at as little cost as possible; stop every penny that you can, just as you would if the ship was your own uninsured, and you have nothing else to depend upon. Mr. Jones cannot open an uncertain credit." This letter is confirmed by one written by Mr. Jones on May 25. It must be observed that, at the time of the correspondence, neither Messrs. H. and G., the master, nor Mr. Jones, knew or could know the actual state of the ship. Messrs. H. and G., in the belief that their draft for 446*l.* would be paid, proposed to advance what might be necessary on bottomry. Mr. Jones refuses to open any letter

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What the probable expense of repairs?

Could the required amount have been obtained either at Savannah, or from England?

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Owner refuses
to open any
credit.

Master could
not obtain
money on bot-
tomry or other-
wise.

of credit for either Messrs. H. and G. or the master, but desires the master to take up merely on bottomry; and he had reason to suppose it would be advanced by H. and G. The letter to the master, declining to give credit, must have been received before the sale of the ship, and communicated to Messrs. H. and G. Then the state of the case was this—that though Mr. Jones might have expected some advance upon bottomry, yet he lessened that chance by refusing to pay the draft for 446*l.*: and though Messrs. H. and G. might have been ready to make an advance upon bottomry to a certain extent, it is very consistent with probability that the draft being repudiated, and the ship not seaworthy, they would not be disposed to make so large an advance as circumstances made requisite. It is perfectly clear that the master could not obtain the monies necessary in any view of the case by bottomry, or otherwise, to bring the ship home to England, even supposing that a less expensive repair might possibly have been substituted. Then what alternative was left him?—To sell the ship, or to allow her to remain until he could obtain directions from the owner. Supposing he had adopted the latter alternative, seven or eight weeks must have elapsed before he could have received an answer, and during that time great additional expense must have been incurred, and the ship must daily have deteriorated in value. Now, assuming a bottomry bond to have been taken, it must have been for the three following sums:—

	£	s.	d.
The expenses prior to April 21	446	0	0
„ after stranding and before sale	833	0	0
„ of repair and fitting out	3,617	0	0
	4,896	0	0
„ premium on bottomry	500	0	0
Total	5,396	0	0
Per contrà there would have been:—			
The freight	1,650	0	0
The value of the repairs	3,617	0	0
The price of the ship	655	0	0
Total	5,922	0	0

This might possibly have been the result if bottomry had been practicable; but it was not: and had the ship been allowed to remain, I think that not only the whole value would have been consumed, but that Mr. Jones would have been left largely

indebted to Messrs. H. and G.; for how stood the account on June 21? The ship was already indebted to them 1,279*l.*, and the value of the ship was only 655*l.* Now if that value had been diminished by delay, it is manifest that Mr. Jones would remain a great debtor to Messrs. H. and G. If money could not be procured on bottomry, it is clear that this ship could not leave the Savannah, for according to the law prevailing there—and the same now exists in this country with respect to foreign ships—the expense of the ship would have been a lien upon her, and she would have been detained until the amount was liquidated. The ship, strange to say, was uninsured, a circumstance so unusual, that it is very difficult to suggest a reason for the omission of what is now almost universally done. If there were any original instructions to the master upon his leaving England, Mr. Jones has not produced them. Then what is a summary of this case? The master leaves England with a ship in such a state that after a few weeks she is in want of repair; he goes to the Savannah without any credit even for the necessary expenses of the ship given to him by his owner, and his owner does not appoint any agent whatever at the port of lading; a bill is drawn for those necessary expenses; the owner refuses to pay it, and does not pay it till March, 1856. The ship meets with an accident; further expenses are the consequence; the owner declines furnishing any credit whatever when informed of that occurrence; he does not know the extent of the damage or the amount of the expense, and he has reason to hope the money may be procured upon bottomry; but it turns out that the ship is utterly unseaworthy, that the expense of repair would exceed her value; that she is known to be uninsured, and bottomry becomes impossible. A sale is advised by all the authorities, and the only other alternative was to await an answer from the owner, which must occupy eight weeks, and such delay would have swallowed up the whole value for which the ship sold, even if the creditors had not arrested the ship by process at Savannah, and sold her to pay her debts. It may be a very unfortunate transaction for Mr. Jones, but it appears to me that a shipowner who sends out his ship not in good repair, and neglects to insure her, and furnishes the master with no credit at all, must be prepared to expect that in case of disaster much loss would ensue. I am of opinion that this sale was justified by necessity, and the whole transaction appears to me to have been conducted with good faith; the best advice was procured, all rational means taken to procure money on bottomry, and the sale was by public auction. I shall restore the ship to the American purchaser—I think a contrary course would be fraught with injustice. The ship has

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Expenses
already due
greater than
value of ship.

Ship liable to
arrest for the
expenses.

Ship restored
to purchaser
with costs and
damages.

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been detained a great length of time (I am sorry to say she was not bailed), to his loss; I must give demurrage and costs. I base my judgment upon the circumstances I have already stated; but I am strongly inclined to think that the master was invested with a larger discretion by Mr. Kendall's letter, confirmed by Mr. Jones. It is true that those letters might and did refer to bottomry in the first instance; but in the event of that failing they were the only instructions the master had, the only instructions he could act upon in such an unforeseen emergency.

Tebbs, proctor for the purchaser.

F. Clarkson for the former British owner.

THE JOSEPHINE, SAMPSON, *Master*.

*Master and Crew—Short allowance of Provisions—17 & 18
Vict. c. 104, s. 223.*

Owing to the unexpected length of a voyage, the crew of a vessel had been put on short allowance. They were, on motion, allowed compensation under the provisions of the Merchant Shipping Act.

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THIS was a suit promoted by the master and some of the crew against the vessel *Josephine*, to recover not only the amount of wages due to them for their services on board of her, but also compensation for having been put on short allowance. No appearance had been given on behalf of the owners of the vessel; the proceedings had been *in pœnam*; three defaults had been granted, and a motion was now made to the Court to sign the *primum decretum*, and for a perishable monition and a commission of appraisement of the ship. It appeared that, in consequence of the severity of the weather on the voyage, it had occupied a much longer time than it would otherwise have done, and that the master was therefore compelled to put himself and his crew on short allowance of food for a considerable time. The 17 & 18 Vict. c. 104, s. 223, provides, that "if during a voyage the allowance of any of the provisions which any seaman has by his agreement stipulated for, is reduced (except in accordance with any regulations for reduction by way of punishment contained in the agreement, &c.), the seaman shall receive by way of compensation for such reduction, according to the time of

its continuance, the following sums, to be paid to him in addition to, and to be recoverable as wages (that is to say)," &c.

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Spinks moved that the sum calculated to be due for compensation might be added to the sum claimed for wages.

DR. LUSHINGTON:—The statement is made *ex parte*, and the owners might have some reasons to urge against this claim, or they might be able to give some explanation; but as they have not thought fit to do so, I shall grant the motion and enforce the provisions of the Act of Parliament.

The Judge accordingly signed the *primum decretum* on the following Court day, the 13th of November.

Rothery, proctor for master and seamen.



THE CHARLES ADOLPHE, L. C. RODANET, *Master*.

Salvage—Abandonment—Alleged misconduct of Salvors not proved.

Salvors may forfeit partially or totally, by various degrees of misconduct, their right to salvage reward, but the evidence to establish their misconduct must be conclusive.

Service performed by a steamer to a disabled vessel can never be considered as mere towage.

AN action was entered by five boats against the brig Charles Adolphe to obtain salvage compensation for services rendered to her on the 6th and 7th of May last. Another action was brought by the steam ship Maas, which towed the brig into Penzance. The actions having been subsequently consolidated, the case now came on for hearing. It appeared that the brig, of the burthen of 213 tons, was bound from Hayti to Havre, having on her way called at Rochelle for orders. When off the Lizard she came into collision with the barque Antagonist, in consequence of which she sustained considerable damage. Her cargo consisted of logwood, cocoa, rum, &c. The master and crew boarded the cutter Fawn, not, it was said, with the intention of abandoning her altogether, but intending to return to her as soon as an opportunity offered of getting her taken in tow. According to the representation of the first set of salvors, the

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brig was observed from Sennen Cove, near the Land's End, in a state of distress. The various salvors successively put off to her aid at great risk, as they alleged, to their lives, in consequence of the ground sea running and the heavy surf. After getting up the anchor they took her in tow, with the view of proceeding to Penzance, but, in consequence of the fluctuations in the quarter from which the wind blew, were obliged frequently to vary their purposes. Ultimately the steamer came up, and the original design was carried out. On the part of the owners it was contended that the boatmen had acted with great impropriety in refusing to allow the master and crew to return to their brig; that the account given by them of the state of the weather was greatly exaggerated; and that the services rendered by the steamer, although valuable, were of very short duration. The value of the property saved was 2,480*l*.

Jenner and *Deane* were heard for the boatmen.

The *Admiralty Advocate* and *Spinks* for the steamer.

Robinson and *Bayford* for the brig.

Judgment.

DR. LUSHINGTON:—This vessel having sailed from Hayti, bound to Rochelle in France for orders, arrived at Rochelle on the 26th of April, and sailed from that port under orders to the port of Havre. On the 5th of May following she was off the Lizard, in the British Channel. On that day she met with a very severe accident, for it is stated on her part that the barque *Antagonist*, of 436 tons—being consequently double her own burthen—ran into her with great violence on her starboard bow, carrying away her bowsprit and foremast, maintopmast, and most of her spars and sails, and cutting her down to the water's edge, and then passed astern of the brig and sailed away without any attempt to communicate with or render any assistance to her. According to the statement, therefore, of the owners of the vessel, she must have received such a degree of damage as to render it imperatively necessary that some effectual assistance should be rendered in order to convey her to a place of safety. The answer to the act on petition states that the brig made water rapidly, and at daylight on the next morning—that is, the 6th of May—the master hailed a fishing vessel, and sent a letter to the French consul. It then proceeds to state, "That shortly after" (that is, I suppose, after daylight on the 6th of May), "the cutter *Fawn*, of Plymouth, arrived, and having sent her small boat to the brig, the master and crew of the brig

Helpers condition of the brig.

Master and crew of the brig go on board the cutter *Fawn*.

proceeded in such boat to the cutter;" and they must have done so under the impression (and I must presume, that the master understood his duty), that the state of the vessel was such as to be dangerous to the lives on board. It appears that after this, though at what time *non constat*, "the master and some of the crew returned to the brig and let go the starboard anchor, and having returned to the cutter, brought her also to anchor." I should conceive, from this statement, that the cutter was brought to anchor in the immediate vicinity of the vessel now proceeded against, but there is no such representation. "That the master of the *Fawn* thereupon engaged with the master of the brig, for the sum of 20*l.*, to remain by the brig and render all practicable assistance, as it was the intention of Captain Rodanet to embrace the first opportunity of getting the brig taken in tow." Now, what took place during the interval following? I do not know, but the act on petition alleges "that about four in the afternoon of the 6th of May several boats, and among them a life-boat, were observed pulling out from the shore towards the brig; such being the boats whose owners, masters, and crews are proceeding in this cause." I am to understand, I conceive, from this statement that these boats, including the life-boat, were seen, before they reached the vessel proceeded against, by those on board the *Fawn*, including the master and crew of the *Charles Adolphe*. I do not distinctly understand how it came about that the master and crew of the *Charles Adolphe* and some of the persons on board the *Fawn* did not continue on board the *Charles Adolphe* at this time. I have no statement why it was that the *Fawn* remained at a distance; all that is left in the dark, and there is no reason assigned, no cause suggested, and no one can explain this part of the case. What is the next statement? "That the wind had then lulled, and it was nearly calm, and the boats were enabled to reach the brig without any danger or difficulty." Then, why this vessel was left at the distance she was without the assistance of the master and crew is unexplained. Then it is said, "That the cutter *Fawn*, with the master and crew of the brig on board her, thereupon also proceeded to the brig, but were prevented by the crews of the aforesaid boats from getting on board the brig, although Louis Clement Rodanet demanded several times to go on board, and asserted his right to do so as her master." There were, it appears, two sets of salvors, viz. the smack's-men, who manned the boats and proceeded to assist the vessel in distress; and the master and owners of the *Maas*, a steam vessel that came up on the subsequent day. With regard to the objection raised

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Brig and cutter
both brought to
anchor.

Life-boat and
other boats
come up.

Alleged mis-
conduct of the
crews of the
boats.

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Different sets of salvors may be justified in bringing separate actions.

Value of property salvaged.

Have the boats forfeited their claims to salvage?

They performed a meritorious service,

and to forfeit the reward thereof the misconduct of the salvors must be distinctly established;

as to there being two actions, though the Court is displeased with it where it can be avoided, the Court cannot say that two sets of salvors may not have reason for bringing separate actions. The interest of the smack's-men was to show that they had rendered the greatest service; the interest of the Maas was to show that the rescue of the brig was owing to her great exertions and power. I cannot say that this is an instance of any abuse of the power given to salvors to sue separately in this Court. Then I come to the value of the property salvaged. I must take it to be 2,480*l.*, which is the amount stated on behalf of the owners, and not contradicted by any of the averments of the salvors. I must take it at that sum for this obvious reason—if there was any dispute as to the value, means should have been taken by the salvors, in the first instance, to ascertain it, which might easily have been done. Therefore I have no hesitation in taking it at the sum I have stated. The next question is, what service was performed by the five boats, so to call them, and have they forfeited their claim by any misconduct? With regard to the danger, the evidence of Lieutenant Maxey is conclusive to my mind that there was considerable risk and peril in rendering assistance. That the vessel herself was in peril is proved by the statement of the owners, proved also by the damage stated to have occurred; and though she was not abandoned *sine spe recuperandi*, there was a temporary abandonment to all intents and purposes. I am of opinion, looking at all that occurred during the night of the 6th, and till the steamer came up on the afternoon of the 7th, that the exertions of these persons were exceedingly meritorious, and that the risk they incurred under the circumstances stated in these proceedings entitles them to very great praise. Have they forfeited that? It is quite clear, whatever may be the nature of the services originally rendered, they are capable of being entirely forfeited by misconduct on the part of the salvors. We never can dispute that principle, for it is supported by the superior Court, as well as in many instances before this tribunal. But there are many things requisite before you can come to that conclusion. First, if you make such a charge, the evidence must be conclusive before the parties are found guilty; and secondly, if the charge be made, and it is proved that the property, from the misconduct of the salvors, has experienced great deterioration, then perfect forfeiture is the result. But there may be a medium. In one case, that of the *Duke of Manchester* (a), by neglect of the salvors the ship and cargo were

exposed to great loss; and this Court held, and was supported therein by the Privy Council, that the salvors, although they had previously performed a service of considerable value, were not entitled to one sixpence, in consequence of their neglect having been the cause of the loss which subsequently occurred. It is sworn positively in this case, by the master of the French vessel, that he attempted to take possession of her; and, on the other hand, it is sworn with equal positiveness by all the persons on board the Charles Adolphe, that they did not know the master was there, and that they did not hear his name mentioned; and so the case stands. It is impossible to substantiate a criminal charge on evidence like this. I am well aware that those on board the Fawn swear they heard language from those on board the Charles Adolphe which would import—supposing it to have been accurately reported—that those on board the latter heard the master claim to come on board as master. But I am a little doubtful of evidence which goes to such minutiae—a little doubtful of hearing at such a distance; and I am not satisfied that there was a wilful determination to exclude the master from coming on board, and if I did I should not entirely reject their claim for salvage, although it would be a wrong thing in itself. I am of opinion, therefore, that the claim of these salvors is not forfeited. With regard to the claim of the steam ship, she performs a service to a vessel disabled and in distress, and taking her in tow cannot by possibility be compared to an ordinary towage service. Looking to the whole of this case, I am of opinion that I should give to the steamer 120*l*. There are five boats, three of which came up in the first instance—namely, the Railway, the Brothers, and the Life-boat; the two others—namely, the Cornish Clipper and the Pilot-boat—stand in a different position, for they did not come up till a later period. To the three first I shall give the sum of 300*l*., and to the two last 150*l*—to be divided according to the number of men on board.

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not proved in
this case.

Pownall, proctor for the steamer.

Wadson for the boats.

Tebbs for the Charles Adolphe.



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November 21.THE DESDEMONA, FARNHAM, *Master*.*Ship—Suits for necessities—Insufficient proceeds—Pro rata division.*

A foreign ship was arrested in a suit for necessities; no appearance being given for the owners, the Court put the Plaintiff in possession of her by a first decree after the usual defaults. She was subsequently arrested by three other parties in similar suits, and the proceeds were not sufficient to meet the total claims. The Court, on motion, by interlocutory judgment, decreed a *pro rata* division between all the parties.

THE present motion arose out of several actions for necessities supplied, which had been brought against the foreign vessel *Desdemona*, but to which no appearance had been given on behalf of the owners, and the ordinary proceedings had gone on in default. On the 5th, 10th and 14th June respectively, *Fielder* entered actions, and warrants were issued against the ship in three separate suits: on behalf of Messrs. Knapp, Jenkins and Latch, in the sum of 400*l.* (a subsequent action was entered on their behalf to cover subsequent advances); on behalf of William Clode in the sum of 100*l.*; and on behalf of Thomas Murray in the sum of 80*l.* On the 8th August these actions were consolidated; on the 19th September the fourth default was granted, and the accounts of *Fielder's* three parties were referred to the registrar and merchants, who reported the total amount due to them to be 555*l.* 3*s.* 1*d.*, with interest at the rate of 4 per cent. per annum from certain dates till paid. The vessel had also been arrested before the commencement of the above actions, at the instance of Messrs. John and James Sydney Batchelor, of Cardiff, shipbuilders and repairers, for necessities, in the sum of 2,500*l.*, their claim, as reported by the registrar, being 2,151*l.* 4*s.* 6*d.*, with interest, &c.; in which suit the judge, on the 26th of June last, at petition of the proctor of Messrs. Batchelor, signed, after the regular defaults, the usual *primum decretum*, and decreed a perishable monition and a commission of sale; the ship had since been sold under such commission, and the net proceeds, amounting to 2,670*l.* 17*s.* 10*d.*, were on the 2nd October last paid into Court. The total amount of the several claims, 2,706*l.* 7*s.* 7*d.*, would consequently absorb more than the net proceeds, exclusive of interest and costs; and a question arose, whether the net proceeds should be divided *pro rata* among all the claimants, or whether Messrs. Batchelor and Co., in consequence of their priority of action and possession,

would be entitled to have their claim and costs paid in the first instance.

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Deane, under these circumstances, moved the Court to pronounce, by interlocutory decree, the amounts set forth in the Registrar's report, to be due to *Fielder's* said parties respectively, together with their expenses; and to decree the said amounts to be paid out of the proceeds of the sale of the vessel now in the registry, *pro ratâ*, with the amount reported to be due under the first action to Messrs. Batchelor, bail to answer latent demands being first given.

DR. LUSHINGTON:—Two points arise for the consideration Judgment of the Court on this motion. The first, one of practice; whether the order to be made by the Court should take the form of a first decree, or of an interlocutory judgment. Where no appearance has been given by the owners, and the proceedings have been in pain, it would be productive of unnecessary expense if all of several parties were obliged to obtain a first decree. I shall adopt the form of an interlocutory judgment. The second point is, whether the party, who first commenced the suit, has a preference in case the proceeds are insufficient. This question was discussed in the *Saracen* (a), the result of which was, that the Court would give priority to any party first obtaining a judgment; but I am not inclined to go a step beyond that, and shall on the present motion decree as prayed.

Fielder, proctor.

[NOTE.—The question of priority of payment arose also in the *Clara*, *suprà*, p. 1. To obviate any confusion from the terms used in that case and the present, it may be well to observe, that a *primum decretum*, first decree, by which the Court puts a plaintiff in possession of a vessel where the proceedings are in pain, no appearance being given for the owner, must be distinguished from an interlocutory or final decree, which are judgments, strictly speaking, of the Court, though often spoken of, as in the *Clara*, simply as "a decree," "a prior decree," "a decree pronounced in the first action."]

(a) 4 Notes of Cases, 498, and 2 W. Rob. 451.



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THE EMPRESS, RICHARD NEWMAN, Jun., *formerly*
Master.

*Sale of Ship—Owner and Master—Indorsement on Certificate
of Registry.*

R. N., sole owner and at first master of the *Empress*, after some intermediate appointments, made his son R. N. master; who, in Australia, without authority, sold the vessel, asserting himself to be the sole owner and master, the certificate of registry and indorsement bearing out, on the face of it, such assertion. R. N. the son, received the purchase-money, but never transmitted it to the father.

Held, that the sale was effected by the fraud and forgery of the son; that the misleading description of him on the certificate of registry, which enabled him to practise such deceit, was not proved to arise from any culpable neglect in the instructions given by the father to the custom-house; and that the sale was null and void.

THIS was a case of possession, arising out of very peculiar circumstances, brought by Richard Newman, of St. Mary's, Scilly, shipowner, against the said brig, her tackle, apparel, and furniture, and against Robert Charles Venn, of Port Adelaide, in Australia, intervening and asserting an interest therein in a cause of possession civil and maritime. It appeared that Richard Newman purchased the brig in 1847, at Sunderland, in county of Durham. She was then quite a new vessel. R. Newman obtained a British register to be granted for her by the name of the *Empress*, at the custom-house, Sunderland, wherein he was registered as sole owner. At first, Richard Newman navigated the said brig by himself, and afterwards employed her under the command of two different masters till July, 1850, when, the brig being in London, he appointed his son Richard Newman as her master, and the name of the said Richard Newman was indorsed on the ship's register, as well as in the custom-house books, as master; so that in the original certificate of British registry in 1847, in pursuance of 8 & 9 Vict. c. 89, "Richard Newman, of St. Mary's, one of the Scilly Islands, shipowner," appeared as sole owner, and "Richard Newman, aforesaid," as master. In January and October, 1848, indorsements were made at Liverpool and Galway of the two intermediate changes of master, and the son's appointment was indorsed in the following words:—

"Custom-house, London, 20th July, 1850; Richard Newman has now become master."

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There was an affidavit from one of the clerks of the London custom-house, to the effect that the instructions delivered by or on behalf of the master of the brig *Empress*, on 20th July, 1850, to the authorities of the customs, for the preparation of the usual bond given by masters of vessels on their appointment as such, in order to have the name of such master indorsed on the certificate of registry, were in the following words :— “ Richard Newman, of 13, America Square, Minories, London, has now become master of the *Empress*, of Scilly,” and that he was so described in the bond. But he was nowhere described as Richard Newman, jun. In December, 1851, the brig, still under command of Richard Newman the son, left London with a general cargo, bound to Algoa Bay, and thence on a trading voyage, as the master might think most advantageous to the owner’s interests. In February, 1853, she was offered for sale by R. Newman the son, representing himself as sole owner as well as master, which the certificate of registry and indorsement enabled him to do, in Port Adelaide, in Australia, and was purchased by Robert Charles Venn, for 2,000*l.* cash. In all the formal instruments of sale, executed at Port Adelaide, R. Newman, jun., described himself as master and sole owner. The original certificate of registry was delivered up to the Custom-house officers at Adelaide, who cancelled the same, and delivered a new one to Venn, who employed the brig in voyages in that part of the world till February, 1855, when she sailed from Adelaide, and arrived in London in July, where in August she was arrested at the suit of Richard Newman the father. Richard Newman the son purchased, soon after the sale of the *Empress*, another vessel, and remained in that part of the world, and had not remitted any part of the purchase-money to his father, though, from letters of his before the Court, it appeared that such had been his original intention. The first of these letters from the son to his father was dated Port Adelaide, April 13, 1853, and gives his account of the sale :—

“ Dear father,—You will feel surprised when I tell you that I have sold the *Empress*, after taking things well into consideration, for the sum of 2,000*l.* I fear you will feel angry doing it without power, but after your mentioning in England your wish to do so, although at a larger figure, and feeling convinced that nothing was to be done here to profit by, wages at enormous rates, &c., I took advantage of the offer, and after a great deal of persuasion, I consented to part with her for your benefit. I parted with her as she stood. Had the name not been as it

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was on the register, I could not have managed it, being Richard Newman only. Cash down at once; and had I only have settled with my consignee, would have remitted you all this mail. I send you a copy of bill of sale; this is principally to stop the insurance on the ship; other documents will be forwarded next mail." The rest of the letter suggested various modes of remitting the purchase-money to his father.

The next letter, dated Melbourne, November 6, 1853, mentions his having bought another vessel instead of remitting the money to his father. On December 3, 1853, he wrote from Adelaide; in January, 1854, from Melbourne. Again, on 25th May and 27th September in same year, and on 1st May, 1855, all detailing the failure of his speculations, and his sorrow at not having sent home the money received for the *Empress* to his father at once. It did not appear that his father had ever answered these letters, or taken any steps to disavow the sale, till he arrested the ship in London, in August of last year. Neither, on the other hand, did it appear that he had recognized the transaction by any act. There was an affidavit from Woodward, the master under whom she arrived in London, to the effect that Richard Newman, when he came on board of the brig, and claimed her, acknowledged that he had authorized his son to sell, but that he had never received the money. This was denied on the other side. From a document on Venn's certificate of registry, it appeared that he had mortgaged the brig in January, 1854, to one Harnott, of Port Adelaide; and that a bottomry bond had been granted on her at Sydney, in December, 1854, by Thomas Allen, the then master.

This case was argued by *Addams* for the original owner.

By the *Queen's Advocate* and *Deane* for the Australian purchaser.

December 6.
Judgment.

DR. LUSHINGTON, after reciting the facts, said:—This vessel was arrested in the port of London, in August, 1855. Clarkson, on behalf of Richard Newman, brought in his act on petition in October of the same year. It was not till 16th July, 1856, that Deacon, for Mr. Venn, brought in the answer. This delay the Court regrets; but it was unavoidably incidental to the circumstances of the case, and Mr. Venn's residence in Australia. A short reply was brought in to this answer. It is necessary to see what is pleaded, and what issues are taken by the parties.

The answer alleges that Richard Newman, who sold her, represented himself to be the sole owner, and that this was confirmed by the certificate of registry; it recites the sale of the ship, and the payment of the purchase-money; it avers, not directly, that Richard Newman gave his son authority to sell; but that, in a conversation which passed between Richard Newman, sen., and Woodward, on board the ship in August, 1855, Newman acknowledged having authorized his son to sell, but said that he had never received the money, and would have his ship back again. This is very important, if proved; but it is essential to the just adjudication of this case, to remember that this conversation stands quite isolated, and that there is no other suggestion of any such authority conferred. It then alleges that it was owing to the neglect of Richard Newman, sen., that in the indorsement on the certificate of registry his son's name was not distinguished from his own; that as this neglect enabled the son to sell, the father should bear the mischief that resulted. The reply denies that the father held the conversation, as pleaded, with Woodward, or that he directly or indirectly authorized the sale, or in any way recognized the sale after he became aware of it. These latter points were not raised in the answer. Assuming that Richard Newman, the son, sold without authority, and that no deception arose from the register and its indorsement, it is quite clear that the sale was null and void. Had the son any such authority? There is no affirmative evidence of anything of the sort. The son admits that he sold without authority, and that he succeeded in so doing by misrepresentation; the sale, in fact, was effected by the son's fraud. Woodward swears nearly as pleaded to the conversation in August, 1855, but the stringent parts of it are denied by Newman himself and by Grey, who was with him at the time. I cannot rely on this alone. A good deal was said in argument as to the ratification of the sale after it took place. Assuming that such effect could be given by any subsequent act to a sale in itself null and void, it certainly ought to have been pleaded, which it is not. But what proof is attempted of it? It was said, why did he not send out to claim his vessel by legal process in Australia? I think he was under no legal obligation to adopt any such measures—himself residing in the Scilly Islands—to instruct some agent in Australia to commence law proceedings. There is no proof of any subsequent acquiescence. As to the certificate of registry, two questions arise;—first, whether it was faulty, and whether such fault is to be attributed to Newman, sen.? and secondly, what deductions are to be drawn from the state of the papers, irrespective of the

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December 6.Statement of
the purchaser.Reply of the
owner.The son had
no authority
from his
father to sell.No subsequent
ratification of
sale by father.

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Misdescription
of master on the
register not the
fault of the
owner, but of
the Custom-
house.

Ship restored
to original
owner, but
without costs.

question whether Mr. Newman, sen., or any one else is to blame? The answer charges Richard Newman, sen., with omissions as regards the register, but it is not clearly stated what he ought to have done or what he omitted to do; it is not stated what instructions or explanations are given to the Custom-house officers on a change of master, or by whom. The original certificate, 1847, clearly shows that the owner and master were the same person; for "Richard Newman, aforesaid," is his description as master. The indorsement at London, "Richard Newman has now become master," opened a door to fraud; but I cannot say that on the face of the documents it clearly appeared that the owner and master were the same person. But, if this indorsement is deficient, and tending to create mistake, whose fault is it? I have, with an affidavit from one of the clerks of the London Custom-house, a copy of instructions given on the change of masters, where the intended master is described as Richard Newman, of 13, America Square, Minories, London, though there is no addition of jun., yet this would have sufficiently distinguished him from Richard Newman, of St. Mary, Scilly Islands. Had the full description been inserted, no one could have supposed them to be the same. As far as the evidence goes, no blame attaches to the owner for this omission, but to the Custom-house officer. However, this indorsement was not the sole or the leading cause of the sale; the misrepresentation and forgery of the son was the cause of the sale, the indorsement assisted. This sale was without authority, and effected by fraud and forgery. I must restore the ship to the original owner, but it certainly is not a case for costs.

F. Clarkson, proctor for the owner.

Deacon for Mr. Venn.



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THE WATAGA, WALFORD, *Master*.*Foreign Ship—Necessaries supplied—Jurisdiction under 3 & 4
Vict. c. 65.*

An American ship supplied with necessaries at Cape of Good Hope by an English firm having an establishment there, on her arrival in port of London was arrested at suit of merchant who supplied the necessaries, and, with the consent of the owner, sold. Payment to him out of the proceeds was opposed by the mortgagees of the vessel, but the Court held that, under the 6th section of 3 & 4 Vict. c. 65, it had jurisdiction on a claim for necessaries supplied to a foreign vessel in colonial as well as in British ports, and decreed payment accordingly.

THIS was a question as to the jurisdiction of the Court under 3 & 4 Vict. c. 65, s. 6, to direct payment, out of the proceeds of a foreign vessel sold by order of the Court, of a sum due for necessaries supplied to such vessel at the Cape of Good Hope by a London firm, having also a trading establishment at the Cape. The parties opposing such payment were mortgagees of the vessel, Messrs. Godfrey Pattison and Co., of Glasgow; the net proceeds of the ship not being sufficient to cover the sum due to them on the mortgage. The *Wataga* was an American ship, belonging to the port of New York, in the United States, and her then sole owner, in 1853, mortgaged her for 11,000 dollars. This mortgage interest eventually came into the hands of Messrs. Pattison. The *Wataga* was arrested in the port of London, in the autumn of the year, at the suit of James Seabright, of St. Helen's Place, London, for certain necessaries supplied by him to the amount of 416*l.*, in January last. Mr. Seabright's affidavit was to the effect that he carries on business at the Cape of Good Hope, and that he had been informed and believed that the *Wataga*, on a voyage from Calcutta to London, put into Simon's Bay, in January last, in want of certain supplies which were necessary to enable her to prosecute her voyage to London; and that he also had been informed and believed that his said house at the Cape of Good Hope furnished such necessary supplies, and that he had made application for the amount so due, but was unable to obtain the same, and that the process of the Court was required to enforce the payment. Burchett, proctor, appeared for the American owner. And on 27th August, the surrogate, at petition of F. Clarkson (Seabright's proctor), on motion of counsel, and with consent of Burchett, by interlocutory decree, pronounced the sum of 416*l.* 10*s.* 6*d.* to be due to James Seabright, for necessaries

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supplied to the said ship, together with his costs. And at the further petition of Clarkson, and with the consent of Burchett, decreed the said vessel to be appraised and sold. The vessel was sold, and after payment of the marshal's disbursements and fees there remained a sum of 1,659*l.* 11*s.* 9*d.* as the net proceeds of the ship. Nicholson, proctor, appeared for Messrs. Pattison, the mortgagees, objected to the payment of Mr. Seabright's claim out of the proceeds, and prayed the Court to decree the net proceeds remaining in the Registry, to be paid out to his parties in part satisfaction of their mortgage bond and interest. An act on petition was gone into on the question; and on the 28th of November, 1856, the case came on for hearing.

Addams for Mr. Seabright.

Jenner and *Spinks* for Messrs. Pattison, who contended that the 6th section of 3 & 4 Vict. c. 65, was not intended to apply to the case of necessaries supplied to a foreign ship in a port at a distance from England, though a British possession, any more than to similar supplies in foreign ports,—against which latter construction the Court itself had decided in the case of the *Ocean* (a).

December 6.
Judgment.

Does the Act of 3 & 4 Vict. c. 65, s. 6, extend to necessaries supplied to a foreign ship in the colonies?

Object of the 6th section of the statute was remedial.

DR. LUSHINGTON gave judgment:—This is an action for necessaries. It is not denied that they were, in fact, supplied to the vessel at the Cape of Good Hope. The only question which has been argued, and which I have to decide, is, whether the jurisdiction of the Court, under sect. 6 of 3 & 4 Vict. c. 65, extends to the colonies. The law was settled by the Judicial Committee of the Privy Council in the case of the *Neptune*, 3 Knapp's Cas. P. C. 94, till it was unsettled by the Act of Parliament, that a merchant or trader supplying necessaries had no right even against the proceeds of a vessel sold in another suit in the Admiralty Court; they certainly had not a lien on the ship itself. Before considering the 6th section itself of the statute, it may be worth while, at the risk of repeating what I said in the *Ocean*, to inquire what evils the legislature desired to remedy. It frequently happened that a foreign vessel in distress on the high seas surrounding the coast of this country, or driven into a port, found great inconvenience and difficulty, owing to want of credit on the part of the master, and to want of communication with her owner, in getting necessary repairs and supplies; or, on the other hand, the English merchant who was

(a) 2 W. Rob. 368; 9 Jur. 381.

induced to provide such supplies frequently found himself without means of obtaining payment. It is clear that the evil would be the same whether the necessities were required in a colonial port or in England; the probable intention of the legislature was, to provide a remedy equivalent to the mischief; but we all know sometimes that *quod voluit non fecit*. The 6th section is in these words: "Be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or seagoing vessel, or in the nature of towage, or for necessities supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been in the body of a county or upon the high seas at the time when the services were rendered or damage received, or necessities furnished, in respect of which such claim is made." Now the four subjects—salvage, damage, towage and necessities—to all of which the words "in the body of a county or on the high seas" apply, are in themselves distinct, and stand in very different relative positions. The Court, prior to the statute, had jurisdiction over salvage and damage, but under limitation as to locality; it had not over simple towage, which was only then coming into use, nor as to foreign ships for necessities; as to salvage and damage when they took place on the high seas only, but not when they occurred within the body of a county; but it has never been contended that the Court could not take cognizance of salvage at Port Louis for instance, which is certainly not in the body of a county, and neither more nor less on the high seas than Simon's Bay. Why should the words receive a narrower construction when applied to necessities? Necessaries supplied in colonial ports require the remedies given by the statute just as much as those supplied in England; and if there was a doubt about the words used, the Court would be inclined to construe a remedial statute liberally. My own observations in the Ocean were much relied on in argument against this construction. If the Court were satisfied that the opinion there expressed were erroneous, it would have no hesitation in retracing its steps. But all such decisions and observations must be read according to the subject-matter which gave rise to them. In that case an English merchant supplied some of the fittings of a new vessel building in a foreign port, and the question was, whether that gave him a perpetual lien on the vessel for their cost—not whether the statute extends to British ports, including colonies, for the supply of necessities to a foreign vessel for the prosecution of a voyage. This claim must be maintained; but I am by no means clear, even if I am mistaken

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The Court
would there-
fore interpret
it liberally.
Case of the
Ocean.

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on the point of colonial ports, that it could not be supported under the narrower interpretation; and whether if this ship were at Simon's Bay when the necessaries were supplied, the term "high seas" would not apply to it.

F. Clarkson, proctor for Seabright.

Nicholson for Messrs. Pattison.

THE LEGATUS, BEAZLEY, *Master*.

Collision—Salvage—Liability to Costs of Salvage Suit, as part of the Damage sustained.

The vessels C. and L. came into collision, in consequence of which certain salvage services were rendered to the C. The salvors brought a suit and recovered 50*l*. The L. was condemned in a suit for damage brought by the C., and on reference to the Registrar and Merchants as to the amount, they struck out the costs of the salvage suit incurred by the C., because her owners had made no tender to the salvors. On objection to their report, held that such costs are, by the practice of the Court, a proper item in the amount to be recovered in a suit for damage, and that there is no general principle laid down in *Tindall v. Bell* (which had been relied upon) to induce the Court to depart from its usual practice.

THE fishing smack *Change* having been in collision with the brig *Legatus* off the port of Lowestoft, was by the aid of salvors taken into the harbour. A suit was subsequently brought in this Court by the smack against the brig, when the latter was found to be the wrongdoer, and a reference was made to the Registrar and Merchants to ascertain the amount of damage sustained. In their report they reduced the claim made by the smack from 184*l*. to 104*l*.; and the owners of the smack now objected to the reduction of various items, more particularly to the sum of 52*l*. 18*s*. 4*d*., the costs incurred in defending an action brought by the salvors. The owners of the brig contended before the Registrar, on the authority of *Tindall and another v. Bell and another (a)*, that the owners of the smack ought to have made a tender to the salvors, and that having omitted so to do, they were not entitled to the costs which they had paid. The Registrar, coinciding in this view, disallowed the charge.

Addams was heard on behalf of the smack.

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Bayford and *Deane* for the brig.

DR. LUSHINGTON:—I shall direct my attention in the first Judgment instance to the only important question which has been argued on the present occasion—namely, whether the Registrar was justified in striking out the claim for costs which were incurred in this Court in resisting a suit for salvage. That suit for salvage arose in this way. After the damage which had been done to the *Change* by the *Legatus*, the former was under the necessity, for the purpose of securing herself from further mischief, to go into a port of safety, and for that purpose took the assistance of the salvors, who brought an action and recovered 50*l.*, but were refused their costs for reasons into which it is not necessary now to enter; but the owners of the *Change* had to pay their own costs, amounting to 53*l.* 18*s.* 4*d.* The question is, whether, under these circumstances, the owners not having made a tender of any sum, they have a just demand against the owners of the *Legatus* for the costs incurred by them in that action? With regard to the practice of this Court, so far as I have any knowledge of it, it has been uniform. It has always been the custom, wherever an action for damage has been brought against another vessel, and where it has been necessary to have recourse to assistance in the nature of salvage, for the remuneration paid for that salvage service to form a part of the claim for damage as well as the costs incurred on both sides in the salvage suit. It may be true that there never has been a case of this sort brought before the Court, but I think that is so for a plain and obvious reason;—the practice of the Court has been such that it would have been considered a desperate attempt to disturb what had been so uniformly and so long done. It is now contended, upon a decision of the Court of Exchequer and a judgment given by Mr. Baron Parke, that the Court ought to depart from its usual course, and to affirm the judgment of the Registrar in striking out this item. I am of course inclined, as I ought to be, to pay the utmost deference to a judgment of the learned judges of that Court in a case of this description, but at the same time I should fail in my duty were I to disturb the uniform practice of this Court, unless I was quite satisfied that it had been founded in error. I could not allow myself to be carried away simply by the practice of those judges. I must be convinced that what fell from the learned judges at common law has the same application as it would to a case before this Court—of which I am not convinced in the

Practice of the Court uniform, that salvage and costs of salvage suit form part of damage.

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Is *Tindall v. Bell* applicable?

Distinction between proceedings at common law and in the Admiralty.

No general obligation to make a tender where salvage service has been received.

No general principle in *Tindall v. Bell* applicable to this case.

present instance. The principle I take to be quite clear, independent of the case of *Tindall v. Bell*, that, where damage is done, the party who has received the damage has a right to be recompensed for all the loss that has occurred in consequence of the damage; the indemnification shall extend to all the consequences which may result from the collision. There are limits, of course, to this proposition as to the ulterior consequences under circumstances which do not belong to this case, and into which it is not necessary to enter. The proceedings in *Tindall v. Bell* were different from the proceedings which take place with us, because our mode of proceeding is to determine whether the defendant is or is not liable for the damage which has been sustained, and then to ascertain the amount of that damage by a reference to the Registrar and Merchants. In *Tindall v. Bell* special damage was stated. In these cases, when tried at common law, the question as to the propriety of making a tender, as to the amount of the tender, whether sufficient or insufficient, goes to be decided by the jury, and the jury, with the assistance of the learned judge, are competent to determine all those points. But what would be the case if I adopted this rule? I should constitute the Registrar and Merchants the judges as to the amount of the tender, and devolve the primary duties of the Court on them. Speaking with great respect of this judgment in *Tindall v. Bell*, can it be contended that it is the duty of the party who has had certain salvage services rendered, in all and every case to make a tender? I apprehend there is nothing more difficult, even with the best advice that can be procured from proctor and counsel, than to determine the amount of the tender. Is a man to place himself in this predicament, that if he tenders a sum that is deemed extravagant, he is to lose the amount of that tender? I am of opinion that I do adopt the principle of Mr. Baron Parke, but I do not carry it out in the manner in which it was done in the Court of Exchequer. I say it is the duty of any owner of a ship which has been damaged, and in consequence become liable to pay salvage, to pursue the course which a prudent man acting on his own account would adopt; but I say that a prudent man in many cases acts much more wisely in taking the judgment of the Court than in making the tender. Let it be understood that I do not mean to dispute the judgment in the particular case of *Tindall v. Bell*, but it does not lay down a general principle which I can follow to the extent which I have been called upon to do on behalf of the party upholding the report of the Registrar and Merchants. Under the particular circumstances of this case I do say that the party proceeding did perfectly

right in not making a tender, and under these circumstances I have no hesitation in acting on the general practice pursued in this Court. I shall, therefore, send the report back to be amended in that particular. With regard to the other items objected to, I am not satisfied that the Registrar and Merchants have committed any error in what they have done.

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Deacon, proctor for the Change.

Stokes for the Legatus.

THE RAJASTHAN, BROCKENBRIDGE, *Master*.

Salvage—Delay of Proceedings—Apportionment.

The R. got on a mud bank off Sumatra. She was got afloat with the assistance of the F., who came to her signals of distress. No risk was incurred by the F. in rendering the service. The value of the property salvaged was 40,000*l.*—500*l.* awarded, half to the master and sole owner, half among the officers and crew.

THIS was a salvage suit, promoted by the *Formosa* against the *Rajasthan*, to obtain compensation for services rendered to her on the 10th of January, 1853. The *Formosa*, bound from Melbourne to Singapore, while lying at anchor at the entrance of the Straits of Banca, observed the *Rajasthan*, distant about seven miles, with signals of distress flying. On bearing down to her it was found that she had grounded on the Sumatra Bank. She remained by her a night and the greater part of a day. By laying out anchors the *Rajasthan* was got off, and proceeded on her voyage from Singapore to London. The value of the property salvaged was 40,000*l.*

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Deane and *Spinks* were heard for the salvors; *Addams* and *Twiss* for the owners.

DR. LUSHINGTON:—The Court greatly regrets the delay that has taken place, because I agree with Dr. Addams that it is always productive of considerable inconvenience, preventing owners and merchants from settling their accounts with the underwriters. But there are circumstances in which delay becomes inevitable, particularly where services take place at such a distant part of the world; and the difficulty is enhanced when vessels are engaged in the Eastern trade, and do not come to this country till after a long period. I was satisfied from infor-

Delay in instituting proceedings always inconvenient, but sometimes, owing to distance, inevitable.

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Dangerous
position of the
Rajasthan on
her master's
evidence.

mation given me that there was good ground for allowing time to Mr. Deacon, the proctor for the *Formosa*; and however much the delay is to be regretted, yet there has been none that has not been authorized by circumstances which it was impossible to avoid. The *Rajasthan* was of the burthen of 700 tons, and the value is very considerable, being no less than 40,000*l*. In what state and condition was she, according to the representation of the master himself, when she required assistance? He says, that while steering down the Lucepara Passage, out of Banca Straits, in consequence of the wind shifting, in a squall, from N.E. to N.W., and a strong current and ebb tide, she suddenly shoaled her water, and presently after grounded on the extreme point of a mud flat off Sumatra. The long-boat was put out, and the stream anchor and chain carried out and laid in deep water. A warp was bent on to the chain, and the chain hove upon by the crew, but, fearing the warp might break, and having seen the *Formosa*, he signalled her for assistance. Now, unquestionably, looking at the locality, it is a case in which more than ordinary danger was incurred. The vessel got on the ground, and the measures this gentleman resorted to failed. Though I do not consider that the service was one of peril to the vessel performing it, yet she came to her aid at a time when the assistance was of great value to the *Rajasthan*. The *Formosa* was delayed for a few hours, having come up to the place where the *Rajasthan* lay, a distance of seven or five miles. I think it is a case that requires moderate compensation, and looking to the value of the vessel I shall give 500*l*.

Deane :—I am desired to ask the Court to distribute that sum between the owner, master and crew,—the master is also the sole owner of the ship.

The COURT :—Then, in that case, I shall allot to the master and sole owner a moiety of the salvage, the rest to be distributed among the officers and crew in the ordinary manner.

Deacon, proctor for the salvors.

F. Clarkson for the *Rajasthan*.

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THE PACTOLUS, M'KELVIE, *Master.*

Collision—Repairs—Principle of estimating Damage.

The owners of a ship damaged by collision are entitled to the full expenses of repairing her and fitting her for sea, though such repairs may make her more valuable than she was before the collision. If the charges are extravagant they must be reduced, but for necessary repairs the owners have a right to be reimbursed; and the evidence of skilful persons who saw the ship after the collision is the best proof of that necessity.

THIS was originally a cause of collision, promoted by the owners of the American ship *Young Brander*, against the *Pactolus*, and in which the Court had on the 16th of May, 1855, pronounced for the damage, and had referred the accounts to the Registrar and Merchants to assess the damages. When the case came before the Registrar and Merchants, the chief point in dispute was as to whether the cost of putting new iron plates and bolts into the *Young Brander* should be allowed or not. It appeared that the *Young Brander* was an American vessel, which had been only recently built, expressly for sale in the English market, and that she was on her way to this country on her first voyage, when the collision in question in this cause occurred. It was stated by her owners that she had been so much shaken by the collision that it became necessary to introduce a quantity of iron plates and bolts between her decks. On the other side, however, it was alleged that, although it might have been very desirable, with a view to increase the value of the ship, to introduce iron plates and bolts, yet that they were not rendered necessary by the collision in question; that it is not unusual for American vessels to be sent to this country insufficiently fastened, in order to their being strengthened with iron plates and bolts, which can be done much more cheaply here than in America; that the *Young Brander* was a vessel of this description; that she was insufficiently fastened, avowedly for sale in this country; and that her owners had taken the opportunity presented by the collision to strengthen her with iron plates and bolts, at the expense of the owners of the *Pactolus*, and to render her more valuable than she had previously been. It was also stated that the charges in the shipwright's bill were excessive. The Registrar and Merchants took this view of the case; they thought that the putting in the iron plates and bolts was not rendered necessary by the collision; that they had been put in with a view to strengthen her and to enhance

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her value; and they accordingly disallowed the whole cost of putting in the iron plates and bolts; they also considered that, looking at the high rate of the charges, a sufficient discount had not been allowed from the shipwright's account, and consequently deducted $4\frac{1}{2}$ per cent. additional, and made some other deductions. To this report an objection was taken, an act on petition was gone into, and the case was fully argued on the 18th July, 1856.

Bayford and Twiss in support of the report.

Addams and Curteis, contra.

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Judgment.
Difficulty the
Court feels in
such cases.

It will not over-
rule a report of
the Registrar
and Merchants
except on the
clearest evi-
dence.

The parties in-
jured are en-
titled to *restitu-
tio in integrum*.

Cases of insur-
ance afford no
guide.

DR. LUSHINGTON now gave judgment:—The Court has experienced some difficulty in revising the report of the Registrar and Merchants in this case, and the reasons are very obvious. First, it is not to be expected that the Court can have any practical knowledge either as to what repairs were necessary in consequence of the collision, nor whether the charges made for such repairs are fair and just; and these are the questions to be determined; secondly, because the affidavits in this case are most contradictory, and I am entirely without the means of judging to which side the greater degree of credit ought to be attributed; thirdly, because the act on petition in objection to the report, and the answer thereto, do not, and perhaps could not, conveniently afford to the Court any information to assist it in forming its judgment. There are, however, two great principles which are clear; first, that respect ought to be paid to the report of the Registrar and Merchants, and that the Court ought not to overrule it unless quite satisfied that it is erroneous. This respect is due both because of the practical knowledge of the Registrar and Merchants in such cases, and also *ut sit finis litium*, that litigation should not be continued on light grounds, and the expense of proceedings lead to a defeat of justice. Secondly, the principle upon which all these reports should be founded is, I apprehend, undoubted; the parties are entitled to *restitutio in integrum*, to a complete repair of all the damage done, notwithstanding that the result may be to render the ship more valuable than she was prior to the collision. If, in consequence of a collision, it is necessary to repair a ship, the effect may be to enhance the value, to render her worth more than she was prior to the collision. In cases of insurance, one-third of the value of the material is deducted, because the new material is more valuable than the old, but it is not so where repairs are done in consequence of collision. The value of a

ship before the collision, or the value when she has been repaired after collision, are questions wholly foreign to these inquiries. The best evidence is that of persons who actually inspected the vessel after the damage—of persons competent to say what repairs were necessary in consequence of the damage. With regard to the bills incurred for such expenses, they must necessarily, for the purposes of justice, be submitted to examination, and extravagant charges lowered by the opinion of persons conversant with the trade; but I must say it is a very arduous task for the Court to decide when such opinions are conflicting. A decision *numero non pondere* is worth very little, and the Court has, as I have said, no means of deciding to whom the greater degree of credit ought to be given. I must, however, make another observation—some of the contested questions I have to consider have previously been made the subject of arbitration at Liverpool, and I regret to say without result. If persons best acquainted with the whole subject-matter and with the course of trade in that great emporium of commerce cannot come to an agreement on these matters, I must necessarily conclude that great doubt and uncertainty prevail as to the questions I have to determine. According to the claim ultimately referred to the Registrar and Merchants, 3,265*l.* was claimed, 2,402*l.* allowed; 863*l.* was therefore deducted; the great deduction being 770*l.* from the carpenter's bill; half the painter's bill has been deducted, and of the bill for copper, viz. 399*l.*, 49*l.* has been taken off; the other items are of very trifling amount. It is expedient now to consider upon what grounds the sum of 770*l.* has been deducted from the carpenter's bill. If it should be proved that this deduction was made because it was established in evidence before the Registrar and Merchants that repairs were done and additions made which did not become necessary on account of the collision, then the report must be confirmed; but I am of opinion that no evidence as to the general state of American vessels can be put in competition with actual evidence as to the state and condition of the vessel herself; for instance, the best evidence in this case is the evidence of those who saw the vessel after the collision, and deposed to the necessity of repairs; the best evidence in contradiction is that of those who saw the vessel after the collision, and who depose that the repairs were not necessary in consequence of the collision. I am of opinion that I cannot and ought not to rely upon any general evidence as to the fitting out American vessels in these particulars. There are two grounds then upon which no doubt such reductions would be justified, provided the evidence established the fact; first, if the bill be extravagant, the charges exceeding the ordinary and

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Amounts
claimed and
allowed.

The condition
of the vessel
after the col-
lision is the
test of the
necessity of
the repairs.

Are the
charges extra-
vagant? and

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were the repairs rendered necessary by the collision?

Evidence as to the general condition of American vessels cannot be put in competition with evidence as to the state of this particular vessel.

accustomed rate; secondly, if the work done was not rendered necessary by the collision. With regard to the first head, it appears that the Registrar and Merchants were of opinion that the charges were high, and that a greater discount ought to have been allowed, and accordingly they deducted the sum of 94*l*. Now this is a matter on which they were peculiarly competent to form a correct opinion, and I am not satisfied by the evidence that they have miscarried; I shall not, therefore, in this particular, disturb the report. As to the second head—and no doubt is raised as to the work having been done—the question is, whether it was rendered necessary in consequence of the collision? In order to show that a part of the work was unnecessary—I refer now particularly to the fastenings and matters connected therewith—evidence was received as to the general state of vessels built in America, and that they were generally insufficiently supplied with iron fastenings, and it was therefore contended that the *Young Brander* must be deemed to have been in the same plight and condition, and that consequently the deficiency of iron fastenings must have originally existed, and could not have been rendered necessary by any collision. I greatly doubt whether such evidence was admissible at all; but I am clearly of opinion that evidence of that description is not to be put into competition with evidence as to the actual state and condition of the vessel, and as to the repairs necessary to be done in consequence of the collision. As to the original state and condition of this vessel, my judgment must be governed by evidence applying to this particular ship, and cannot be affected by other considerations. So as to the repairs necessary to be done—that is, assuming the original state and condition proved by evidence—as to the damage sustained and repairs necessary in consequence of such damage. It would answer no good purpose to read over and comment on the affidavits. I shall refer to one only, brought in by Mr. Tebbs, which I think of great importance in governing my judgment—these are the words:—"The repairs made to the *Young Brander* under my direction and that of the other surveyors were general and extensive, in consequence of the vessel having been so much shaken by the collision." Looking at the peculiar nature of this case and of the questions which have arisen,—remembering that I cannot bring to the consideration of such questions any knowledge or experience of my own,—and recollecting also that I ought under such circumstances to be very slow to reverse the judgment of the Registrar and Merchants, yet that it is still my duty carefully to weigh and to be governed by the evidence produced; the result to which I have come is, that I affirm all

the deductions made by the report as to the excess of the amount of charge, which includes their deduction on account of discount; but I alter the report by determining that all the work done was necessary to be done and ought to be paid for subject to similar deductions as to overcharge; and I must give the costs of the present proceedings to those who objected to the report.

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The charges are extravagant and the deductions made must be affirmed, but all the work was necessary.

F. Clarkson, proctor for the Young Brander.

Tebbs for the Pactolus.



THE RODERICK DHU, WM. M'TAGGART, *Master*.

Bottomry—Commission—Practice.

On taking the ship's accounts in a cause of bottomry, it was ascertained that, save as to the agent's commission, no money was due as against the ship; and the Registrar and Merchants reported that the commission was so excessive that on the balance of account, after reducing the commission to a proper amount, the owners of the ship were creditors and not debtors. Bond pronounced against with costs.

THIS was a suit promoted by Messrs. Fruhling and Goschen, the holders of a bottomry bond upon the ship, cargo and freight. It appears that the Roderick Dhu having met with tempestuous weather, put into the Island of St. Thomas, where her cargo was discharged, and where she underwent considerable repairs. The owners hearing of the circumstance despatched Captain M'Taggart to St. Thomas to see to the ship's repairs, and gave him 4,000*l.* to liquidate all the accounts, and afterwards remitted to him 3,000*l.* additional. It would seem, however, that before the arrival of Captain M'Taggart, the master had placed the affairs of the ship in the hands of Mr. Emerson, Lloyd's agent and the British consul at St. Thomas, under whose superintendence the repairs to the ship were done. Captain M'Taggart did not, upon his arrival, remove the ship from Mr. Emerson's hands, but paid him the 7,000*l.* to settle the accounts. Mr. Emerson, however, brought in an account showing a balance of about 11,632 dollars due, over and above the 7,000*l.* which had been paid to him, and for this balance a bottomry bond on ship, cargo and freight, with a maritime premium of 14½ per cent. was given by M'Taggart, who had then become the master, and it was in regard to the validity of

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this bond that the present suit was instituted. The Court, before pronouncing upon the validity of the bond, referred the accounts to the Registrar and Merchants, to report thereon.

Registrar's
Report.

The following is a copy of the Registrar's Report, and of the Schedule annexed thereto:—

To the Right Honorable STEPHEN LUSHINGTON,
Doctor of Laws, Lieutenant Judge and President
of the High Court of Admiralty of England.

WHEREAS by your decree of the 22nd day of January, 1856, you were pleased to refer the bottomry bond proceeded on in this cause, together with all accounts and vouchers brought in or thereafter to be brought in relative thereto, to your Registrar and Merchants, to report the amount (if any), which should appear to be due upon the said bond.

Now I do most humbly report that certain accounts and vouchers having been brought in by the proctor for and on behalf of the parties proceeding in this cause, I did, with the assistance of Messrs. John Cattley and Robert Embleton, of London, merchants, take the same into consideration, as also all the papers and proceedings produced and brought in, together with what was urged by the parties, their proctors and agents, on both sides, and we are of opinion that no sum whatever is due to the said Messrs. Fruhling and Goschen upon the said bond, as appears by the schedule hereunto annexed. And with reference thereto, and to the accounts brought in by the bondholders, we would beg to observe:—

(1.) That the accounts of Mr. William J. Emerson, who was the agent for the ship during the time she lay at St. Thomas, and was at the same time her Britannic Majesty's consul and Lloyd's agent in that Island, are, in our opinion, most unsatisfactory, and in many particulars highly improper and objectionable.

(2.) That the sum stated to have been advanced on the said bottomry bond could only have been required to pay the commissions of the said Mr. William J. Emerson, the amount, charged by him in his account for commissions, being greatly in excess of the sum alleged to have been advanced on bottomry.

(3.) That the principal repairs to the said ship appear to have been done by the firm of Messrs. Sanbot & Co., in which house

Mr. W. J. Emerson is asserted to have been a partner at the time, and which assertion was not denied.

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Registrar's
Report.

(4.) That in an account for 4,222 dollars 41 cents, charged by the said Messrs. Sanbot & Co. for the said repairs, no specification or details are given for 3,900 dollars thereof.

(5.) That the charge of 5,184 dollars 76 cents, made by the said Messrs. Sanbot & Co. for storing the cargo of the said ship, is at the rate of 2 per cent. upon an assumed value of the cargo, which ultimately proved to be excessive.

(6.) That the charge made by the said Mr. W. J. Emerson of 1,532 dollars 37 cents, being a commission of 5 per cent. on his alleged disbursements, on account of the said ship and cargo, is excessive, inasmuch as it clearly appears that, during the time the said ship remained at the said Island, he received from her owners for the said ship's disbursements no less a sum than seven thousand pounds (7,000*l.*), which was more than sufficient to pay the whole of the disbursements and all his reasonable charges besides.

(7.) That the charge made by the said William J. Emerson, of 12,961 dollars 92 cents for his trouble in the matter, is exorbitant, and that the sum of 1,000 dollars allowed by us on that account is, in our opinion, amply sufficient.

(8.) That without entering into a minute examination of the accounts in this case, which the documents furnished to us do not enable us to do, it appears that, after deducting the commissions improperly charged, there was due from the said William J. Emerson to the owners of the said ship the sum of 1,095 dollars 18 cents, and not, as pretended, a sum of 11,632 dollars 93 cents from them to him, at the time when the said bottomry bond was executed.

(9.) That we entertain considerable doubts as to the bonâ fide character of the whole transaction, and whether in fact Messrs. G. Nunez and Gomez, the gentlemen to whom the said bond was given, ever advanced any money whatever on account thereof.

All which is most humbly submitted by

(Signed) H. C. ROTHERY,
Registrar.

Admiralty Registry, Doctors' Commons,
14th June, 1856.

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Registrar's
Report.*Schedule referred to in the annexed Report.*

No.	Description	Claimed.		Allowed.	
		Dollars.	Cents.	Dollars.	Cents.
1.	Custom-house duties on cargo	2,700	40	2,700	40
2.	Labourers discharging and reloading cargo..	8,130	22	8,130	22
3.	A. Sanbot and Co., storing cargo at 2 per cent. on the value	5,184	76	5,184	76
4.	Two hospital bills	637	17	637	17
5.	Seamen's wages, discharged from vessel....	2,657	40	2,657	40
6.	Capt. Murdock	300	0	300	0
7.	Coopers and mates	563	0	563	0
8.	Boat hire at sundry times	53	89	53	89
9.	Surveyors	208	0	208	0
10.	Capt. Murdock's board	50	0	50	0
11.	Blacksmith	55	80	55	80
12.	Dr. Erichsen	196	0	196	0
13.	Sailmaker	122	0	122	0
14.	A. Sanbot	4,222	41	4,222	41
15.	Disbursements of brig "Mary Stewart"....	1,541	41	1,541	41
16.	Burying deceased sailors	90	95	90	95
17.	Butcher	668	50	668	50
18.	Apothecary	84	66	84	66
19.	Newton and Kamp, chandlery	1,841	67	1,841	67
20.	Newton and Kamp.....	10	16	10	16
21.	Sand and lime.....	25	47	25	47
22.	Board and attendance on sick sailors	41	0	41	0
23.	Consular fees	89	50	89	50
24.	Painting and scraping ship	50	0	50	0
25.	Paid for a boat	65	0	65	0
26.	Capt. Murdock's passage to Halifax	70	0	70	0
27.	Extra medicine	4	44	4	44
28.	Capt. M'Taggart, on account of his wages ..	100	0	100	0
29.	One oil lamp	2	50	2	50
30.	Water	8	50	8	50
31.	Advances to seamen shipped here	115	30	115	30
32.	Fort fees	3	0	3	0
33.	Capt. M'Taggart.....	100	0	100	0
34.	Port charges and harbour fees	648	95	648	95
35.	Printing hand-bills	5	50	5	50
36.	Commission on disbursements, \$30,647: 56, at 5 per cent.	1,532	37	766	18
37.	Commission, 5 per cent. on cargo, valued at £54,008—say 1,256 tons at £43 per ton—\$259,238: 40, at \$480 Ex. at 5 per cent... 12,961 92	12,961	92	1,000	0
38.	Commission, 5 per cent. on charter of "Mary Stewart," £44, at \$4: 80	213	84	213	84
	Deduct—	45,355	69	32,627	58
	C. J. Fox's drafts on the Liverpool Borough Bank:				
	£2,000, sold at 487½.....	\$9,750	0		
	£1,000, sold at 492½.....	4,925	0		
		14,675	0		
	Less commission endorsing, 1½ per cent.....	220	12		
		14,454	88		
	Proceeds of draft for £1,000, received from Rothschild & Coen through Capt. M'Taggart	4,801	88		
	Cash received for scraping.....	66	0		
	" from M'Taggart... 14,400 0				
		33,722	76	33,722	76
	Sum advanced on bottomry	11,632	93	..	
	Maritime premium, 13½ per cent.	1,686	77	..	
	Sum claimed under bottomry bond.....	13,319	70	..	
	Sum due to owners on balance of account.....	..		1,095	18

H. C. ROTHBURY, Registrar.

To this report an objection was taken on behalf of the bondholders, an act on petition was gone into, and the case was argued on the 6th of December, 1856.

Robertson and Bayford for the bondholders.

Addams and Twiss for the owners.

DR. LUSHINGTON now gave judgment:—This case comes before the Court under the following circumstances :—It was originally a cause of bottomry brought by Messrs. Fruhling and Goschen, and it is alleged that this ship being of the burden of 1,200 tons, and commanded by Murdock, put into St. Thomas in March, 1855; that M'Taggart, who succeeded Murdock, being without funds, did, in June, 1855, borrow from Messrs. Nunez and Gomez the sum of 2,418*l.* on bottomry, at the rate of 14½ per cent. maritime premium, and on June 21, 1855, executed a bottomry bond for that amount. On the arrival of the vessel in this country a suit was brought for the recovery of the amount due on this bond. The bond was opposed by the owners, who alleged that the vessel having sustained damage by tempestuous weather, and having put into St. Thomas for repair, John Murdock, the then master, appointed Mr. Emerson, a merchant at St. Thomas, Lloyd's agent and also British consul, his agent, and that Murdock was required and did sign an agreement, of which I shall speak more presently; that the owners being informed of the condition of the vessel, sent an agent to St. Thomas with 4,000*l.* to liquidate all demands: that a further sum of 3,000*l.* was sent and paid over to Mr. Emerson, whereby all lawful demands were paid; and that the bond was given for no legal consideration. When this case came before the Court, it was manifest that its judgment might be affected by the state of the accounts, and accordingly the Court, without pronouncing any opinion as to the validity of the bond, directed a reference to the Registrar and Merchants to take the accounts. The report of the Registrar and Merchants has now been brought in, and has been objected to on behalf of the holders of the bottomry bond. It therefore becomes my duty to consider the report and the objections thereto. The schedule annexed to the report shows that nearly the whole of the items were allowed, but that the commissions were subjected to a reduction; 14,706 dollars had been demanded by Mr. Emerson for his commissions, and 1,979 dollars were allowed. Consequently the Registrar and Merchants were of opinion that there was an excess of charge on this head amounting to 12,727 dollars. And they further

1856.
December 6.

December 28.
Judgment.
The circumstances of the case.

Necessitated a reference to the Registrar and Merchants before the Court could come to a conclusion as to the validity of the bond. Their report reduces largely Mr. Emerson's commissions.

1856.

December 23.

It is a necessary condition of a bottomry bond that money is due from the owners for the necessities of the ship.

The usages of particular ports are not to be entirely disregarded,

but form no inflexible guide for the judgment of the Registrar and Merchants.

Mr. Emerson, as consul and Lloyd's agent, was precluded from making any special agreement with the master.

found, upon taking the whole account, that so far from there being anything due on account of the ship, 1,095 dollars were owing to the owners on balance of the account. The question, therefore, that I shall have to decide is, whether the Registrar and Merchants have acted rightly in the deductions they have made. First, as to the principle upon which the Court must decide this question, I apprehend it to be established by every day's practice, that those who advance money on bottomry cannot recover upon the bond any amount which was not justly due and owing by the owners of the ship on which the security is given; though it is true that merchants advancing money upon bottomry are not bound to see to the application of the money; yet that money must be wanting for the necessities of the ship. That this is the law is clearly shown by every day's practice; and I shall not stop to prove why such ought to be the law, or what would be the consequence if money could be advanced on bottomry without adequate necessity. The sole question thus far in this case is, whether the deductions made by the Registrar and Merchants are correct or not. It is alleged, in objection to the report, that they have disregarded the customs and usages of the island of St. Thomas, in respect of mercantile commissions. Certainly, if the Registrar and Merchants had acted on any such principle as that alleged, they would have been in error, because it is well known that the rate of commissions varies according to the circumstances of particular places, and cannot be subjected to one inflexible rule; but it does not therefore follow that because the Registrar and Merchants have reduced these commissions, that they have acted upon any such supposed rule. I am further of opinion, that the Registrar and Merchants are not bound to allow commissions according to what may be alleged to be the custom in any particular place, but that they are justified in forming their own opinion, giving due consideration to all the circumstances of the case and to local usage. If my memory does not deceive me, the Privy Council have acted upon that principle, and have reduced commissions, despite affidavits to the effect that the commissions were usual and customary. Another ground, however, has been set up in argument, viz., that Mr. Emerson made a special agreement with the master, when he undertook the agency, that he should be entitled to all usual and accustomed fees of merchants in the island. I am of opinion that neither Mr. Emerson nor the master was justified in entering into any such agreement. Mr. Emerson was not merely a merchant of St. Thomas, but he was British consul and Lloyd's agent, and he had no right whatever to make any agreement inconsistent with the duties and obligations which

attached upon these two characters; and for very obvious reasons—not only was he bound by his engagements, but it is to be supposed that masters of British ships coming into that island enjoyed his services in consequence of the public situations he filled, and on the faith that he would fulfil the obligations incident thereto. Mr. Emerson was dismissed by the committee at Lloyd's for the breach of such engagements, and so far as he is concerned he can have no pretence for claiming a benefit arising from a breach thereof. Then as to the master, how was he circumstanced? He arrived on the 7th March in distress, and on the 8th he was compelled or induced to sign this document, annexed to the first act; he had not one atom of authority to bind his owners for any expense for which they were not legally liable, and therefore the question resolves itself back into this, whether these charges are just and lawful. The commissions in this case for disbursements, care and superintendence from March till June amount, according to the claim, to nearly 3,000*l*. The Registrar and Merchants have allowed 400*l*. I am most clearly of opinion that the charge made was most exorbitant and unjustifiable, and that the sum of 400*l*. allowed by the Registrar and Merchants was fully adequate. It has been urged that the ship might have been detained in the island till all these charges were paid, and that therefore I ought to allow them. In answer to this argument, the case of the *Augusta* (a), was cited; and in that case Lord Stowell expressed his opinion, that a bottomry bond could not be upheld on this ground alone, even in a case where the expenses might be legitimate. Two things are necessary to give validity to a bottomry bond—that the money should be advanced on bottomry, and that it should be wanted to defray the necessities of the ship. Such, I think, are the rules to be reduced from the case of the *Augusta*, and many other decisions of Lord Stowell. It has been further said that—to confirm this report would bear very hard on Messrs. Nunez and Gomez, who actually advanced the money—their characters as merchants might be affected by such a decision. It may be true that they did advance the money; and I am willing to assume the fact to be so, though the Registrar and Merchants, who had full opportunity to investigate the transaction, entertained a suspicion to the contrary. But the true question is, not whether they advanced the money, but whether it was wanted for the necessities of the ship. This is the matter that they, Messrs. Nunez and Gomez, ought to have investigated, and this they had ample means of doing; they would then have found that 7,000*l*. had

1856.

December 23.

The master could only bind his owners for just and lawful charges.

Were these charges such? That the ship might have been detained is not by itself a sufficient ground.

The money must be required for the necessities of the ship.

And it is the duty of parties advancing money on bottomry to see that it was wanted for the necessities of the ship.

(a) 1 Dod. 283.

1856.

December 23.

Bond pronounced
against, with
costs.

been paid; they would have seen that nearly 3,000*l.* was charged to commissions; that no money was wanting save to defray such commissions; that otherwise Mr. Emerson was a debtor to the ship. If, with these facts before them, they would not open their eyes, and hold their hands, it was their own want of due caution. I confirm the report; pronounce against the bond, no money being required to supply the necessities of the ship, all lawful charges being already paid; and condemn the bondholders in the costs.

Nelson, proctor for bondholders.

F. Clarkson for owners.

1857.
January 16.

THE JOSEPH SOMES, C. T. ELMSTONE, *Master*.

*Collision—Starboarding the Helm to avoid immediate Danger—
17 & 18 Vict. c. 104, Sect. 296.*

The *Glanmire* was sailing on the starboard tack; the *Joseph Somes* was going free, and omitted to port her helm until she had got too near to the *Glanmire*; the *Glanmire* starboarded her helm to avoid immediate danger.

Held, that the *Glanmire* was justified under the circumstances in starboarding her helm, and that the *Joseph Somes* ought to have ported sooner.

THE barque *Glanmire*, of the burthen of 246 tons, bound from London for Barbadoes, and the barque *Joseph Somes*, of the burthen of 774 tons, proceeding from China for London, came into collision with each other at 10 P.M. on the 28th of April, 1856, a few miles from the Portland Light. The *Glanmire*, as she stated, was keeping her course west half north, making four and a half knots, the wind moderate from north by west, and the weather fine and clear, when she descried the *Joseph Somes* right ahead, without a light, distant nearly a mile. The *Glanmire* instantly ported her helm, and in a few minutes perceived that the *Joseph Somes*, which was on the port tack, was keeping her wind, and crossing the bows of the *Glanmire*, which course she continued until she was a little on her weather bow, distant less than a cable's length. The danger of a collision being thereby rendered immediate, the helm of the *Glanmire* was starboarded, but before her sails had had time to fill, the helm of the *Joseph Somes* was suddenly put to port, but too late; and the consequence was that the *Joseph Somes* with her cutwater struck the *Glanmire* amidships on the starboard side, doing her serious damage. According to the statement of the *Joseph Somes*, the wind at the time of the collision was blowing moderately from about N.N.E., and the night was rather dark, but not foggy or hazy; she had two lights ready to be exhibited when required, one of which was occasionally moved or flashed across the bows. The light of the *Glanmire* was observed distant from one to two miles, upon which she exhibited her own light. On the vessels arriving within about a quarter of a mile of each other, it was discovered that the *Glanmire* was two points on the *Joseph Somes*' port bow, standing about W. by N. The helm of the *Joseph Somes* was thereupon put hard aport, and the *Glanmire* was hailed to port her helm, but instead of so doing, she starboarded it, and ran

1857. across the Joseph Somes' hawse. Cross actions were brought
January 16. by the respective parties.

Addams and *Twiss* were heard for the *Glanmire*.

The *Queen's Advocate* and *Deane* for the Joseph Somes.

The Court was assisted by Captains *Farrer* and *Close*.

Judgment.

DR. LUSHINGTON, addressing the Elder Brethren, said :—
 Gentlemen, there are peculiar circumstances in this case, to the
 consideration of which it is my duty to draw your attention. I
 shall not occupy your time by going through matters which
 are generally agreed upon between the parties, but commence
 by stating what I think has led to the confusion which has
 occurred in the evidence in this case. The collision took place
 on the 28th April in last year, and although the suit commenced
 on the 13th of May, and the libel was brought in on the 3rd of
 June, it unfortunately happens that the only witness examined
 on the libel at that time, namely, on the 28th of June, was
 Robert Sidey. The other witnesses, who have been examined
 in support of the complaint, were not examined until the 28th
 of November, and following days. Now, gentlemen, this cir-
 cumstance satisfactorily accounts to my mind why it is that
 Robert Sidey speaks with greater certainty and greater spe-
 cification as to the facts, than the other witnesses. It is greatly
 to be lamented that such delay did take place, for it tends
 to render it exceedingly difficult to administer justice with
 certainty. I do not mean to impute blame to any one; it may
 have been impracticable to examine the witnesses before; but
 the consequence of the delay is to throw the evidence into such
 a state as to render it exceedingly difficult to arrive at a just
 conclusion. I think both vessels saw each other in time to
 avoid a collision, provided they had adopted proper measures.
 It is a question whether the *Glanmire* at the time of the collision
 was close hauled on the starboard-tack, or not. It is an ad-
 mitted fact that the Joseph Somes was sailing with the wind free
 two points. Whether or not it would be so free as relates to the
Glanmire, I cannot undertake to say. The case of the *Glanmire*
 is briefly this, that having perceived the other vessel, according to
 her statement, at a distance of about a mile, she did at that time
 port her helm, and kept it to port; but when the collision was
 imminent she starboarded her helm, and the collision is imputed
 to the Joseph Somes delaying to port her helm. That is the
 substance of her case. You will, therefore, have to determine

Great delay in
 examining the
 witnesses.

Much to be
 lamented.

Courses of the
 two vessels.

Case of the
Glanmire.

whether you think from the evidence it is sufficiently established that the Joseph Somes delayed to port her helm in due time. You will have to consider whether the Glanmire, in starboarding her helm—which it is an admitted fact she did—was justified in that measure. I have no hesitation in telling you that, in my opinion, there is an abundance to bring the case within the Act of Parliament, it being proved that she did starboard her helm. The words of the plea are these—"that as the danger of a collision was thereby rendered immediate, the helm of the Glanmire, which until then had been kept a-port from the time when the other vessel was first seen, was ordered by the chief mate to be put a-starboard, and which order was obeyed." I must now however draw your attention very briefly to the evidence on the part of the Glanmire. Four witnesses have been brought forward to establish the case of the Glanmire, and reliance has been placed, and most properly placed, on the evidence of Robert Sidey, who was at the helm at the time. The effect of his evidence is, that, just at the time the Joseph Somes was seen, he was ordered to ease the helm a little, because the vessel was going too close to the wind; that immediately after the Joseph Somes was descried, the helm was put to port, and continued thus until the Joseph Somes came so close upon her that, for the purpose of avoiding immediate danger, it was put to starboard. Captain Barrett, the master of the Glanmire, was below at the time; therefore we must lay him out of the case altogether. With regard to the evidence of Fisher, I must candidly tell you that, in my opinion, it is not to be trusted. Similar observations do not apply directly to the evidence of Duncan or Ombla; I see no reason to impute anything to them but failure of memory; but that is so great in the case of Duncan that I can place no confidence on him. Then how stands this case? The case of the Glanmire is supported by one single witness, and he is contradicted by others, though I cannot rely on the contradictions. Now, if there had been no plea given in, no defence made, and no witnesses examined on the other side, I should have had no hesitation in saying that, under the circumstances, the case on behalf of the Glanmire was not made out. But let us now consider what is the case set up by the Joseph Somes, and whether, upon examination and consideration of the whole of the evidence, you are of opinion, taking either the evidence on behalf of the Joseph Somes only or in conjunction with that of Robert Sidey, that the case of the Glanmire is made out; if so, you will pronounce for her. It is not of much importance whether the helm of the Joseph Somes was ported once or twice; the question was and is, whether the Joseph Somes did not see, according to

1867.

January 16.

Was she justified in starboarding her helm.

Evidence on behalf of the Glanmire.

Does not make out her case.

But did not the Joseph Somes see the Glanmire in time to avoid the collision?

1857.
January 16.

Questions to
the Elder
Brethren.

her own account, this vessel on the starboard tack, she herself being free, at such a distance that it was entirely within her power to escape the collision, if she had ported her helm in due time. Now we will retire for consultation; but before doing so, I will put to you the questions stated by the Queen's Advocate. The questions I have to put to you will be these;—first, whether you are of opinion that there was any culpable delay on the part of those on board the Joseph Somes in not porting her helm in due time so as to avoid the collision;—secondly, I shall have to ask you, whether, if you are of opinion that there was such delay, the measure of starboarding the helm pursued on the part of the Glanmire was or was not justified by the circumstances. When I say justified I mean justified in order to avoid immediate danger. If the Queen's Advocate was right, the starboarding of the helm could not lead to an escape from the blow, but only to increase the damage,—and then, of course, it was not justifiable.

The Court and the Elder Brethren having retired for consultation, on their return

Joseph Somes
to blame for
not porting her
helm in time.

Glanmire
justified under
the circum-
stances in star-
boarding her
helm to avoid
immediate
danger.

DR. LUSHINGTON said:—I am now about to declare the conjoint opinion of the Trinity Masters and myself. Having given the best consideration to this case, we are of opinion that, entirely omitting to ascribe any weight to any one of the witnesses produced on behalf of the Glanmire, excepting Robert Sidey, and also bearing in mind that he is contradicted in some respects by the mate in charge, yet looking to the whole of the evidence produced on behalf of the Joseph Somes, there was culpable delay on the part of the Joseph Somes in not porting her helm in time, and the consequence of that delay was that the Glanmire, in order to avoid the immediate danger of collision, starboarded her helm, which she was justified in doing, for the purpose of taking every possible chance of avoiding the collision. It was justifiable in law, and the right course to take, looking at the circumstances of the case. Therefore I pronounce for the Glanmire.

Bathurst, proctor for the Glanmire.

Deacon for the Joseph Somes.

1857.
January 22.

THE ALFEN, A. A. JACOBSEN, *Master*.*Salvage—Vessels under Charter—Services by Steamer.*

The charterers of a vessel are not, except under very special circumstances, entitled to the salvage earned by that vessel. The Court looks with great favour on services performed by steamers.

THIS was an action brought by the steam-ship *Empress Eugenie* against the Norwegian barque *Alfen*, to obtain compensation for salvage services rendered to her near Lamp-sake Bay, in Asia, on the 11th of January, 1856. The barque, coal-laden, had been driven on a shoal in consequence of the tempestuous state of the weather. The steamer went to her aid, and succeeded in tugging her off. On the part of the owners it was contended that the services were of a very slight nature. The value of the property salvaged was 1,634*l*.

Twiss and *Spinks* were heard for the salvors.

Addams and *Deane* for the owners.

DR. LUSHINGTON:—This is a claim for salvage preferred on Judgment. behalf of the master, owners, and crew of the steam-vessel *Empress Eugenie*, which is represented to be of 514 tons burthen, propelled by two engines of 50 horse-power each, manned by thirty-two hands, and of very considerable value, amounting to nearly 20,000*l*. It is said that she, being in ballast, and sailing from Constantinople to Greece, performed the service the particulars of which I must presently briefly advert to, and, at the time of the performance of this service, was chartered to the Turkish government, and was in their employ. The vessel to which the service was rendered was a Norwegian barque, and was carrying coals for the use of the Turkish government; whether she was chartered to bring them from Constantinople for the Turkish government or sold them afterwards, is not very clear from the evidence; but, in the view I take of it, it is not of any importance. It was originally alleged that no salvage reward was due under these circumstances, because the steamer was in the service of the Turkish government, and so was the vessel to which the service was rendered; but that argument has with great propriety been abandoned. It may be convenient to say a word, to prevent mistake, as to the principle

1857.

January 22.Vessels under
charter.Charterers not
entitled to
salvage, except
under special
circumstances.Court looks
with favour on
services rendered by
steam-vessels.

which I think ought to apply to cases not exactly of this description, but approaching nearer to the case of the *Waterloo* (a). I apprehend that where a vessel is under charter, unless there be express terms in the charter-party giving the charterer the right to control salvage, and the benefit of any salvage, if performed, the charterer has no claim to reward for salvage services rendered by the ship. I conceive there are various reasons why this must be the case. In the first place, with regard to the personal exertions of the master and crew, they are wholly independent of the charterer: it would, therefore, be quite contrary to justice that the charterer should found any claim upon them—and not only so, but it would not conduce to the safety of ships at sea if it could be said that the master and crew were to be deprived of the effect of their personal exertions. I apprehend, therefore, that salvage would not belong, except in special cases, to the charterer; but, at the same time, I do not mean to say there might not arise out of the circumstances of the salvage a reason for the charterers refusing to pay the whole amount for which they chartered the ship, or a right of action against the owners of the ship for delay and loss incurred. These circumstances do not arise on this occasion; but it is expedient that there should be no misunderstanding of the law. When I considered this case I had not in my memory that of the *Waterloo*; though, when it was mentioned by Dr. Twiss, the circumstances came back, after a lapse of thirty-seven years, with considerable freshness. The Liverpool case (b) I did remember. I shall act upon it, and the judgment there delivered would be my judgment, if it were necessary to decide that point now. Therefore this case resolves itself into the simple question, what ought to be the *quantum* of reward given for the services rendered? The Court is always in the habit of looking with a considerable degree of favour towards the exertions of steam-vessels which procure the release of ships, if I may so term it, from calamities on shore; and for this reason—a steamer can do it with so much celerity, and render assistance so much more effectually, than can be done by other means, whether it be the lightening of the vessel or anything else. The Court does not look at the *minutiæ* except it be in cases of danger or extraordinary labour. We all know the mode in which a steam-vessel goes to work to get a ship off the shore or off a bank—it is by annexing a hawser, and by applying the power of the vessel, that the service is effected, and it appears to me that there are no peculiar circumstances attend-

(a) 2 Dodson, 433.

(b) The Arabian. This case is not

reported, but it was decided on the 5th of April, 1853.

ing this case. I think the vessel proceeded against was in danger, and if the weather had continued unfavourable or boisterous that danger would have been greatly increased. The service did not occupy many hours; but, looking at all the circumstances of the case, I shall give the sum of 175*l.*, with costs.

1857.
January 22.

F. Clarkson, proctor for the salvors.

Orme for the Alfen.



THE MESSENGER, R. HUNTER, *Master*.

Salvage—Appeal from Award of Justices.

The Court of Appeal will hesitate to interfere with the decision of local authorities on a question of salvage, but at the same time is bound to act upon its own judgment if it should be of opinion that the award is wholly inadequate.

THIS was an appeal from a salvage award made by two of the justices of the peace for the borough of Sunderland. The suit was brought by the steamboat *Pilot* against the brig *Messenger*, coal-laden, to obtain compensation for services rendered to her on the 21st of August in conducting her during tempestuous weather into the port of Sunderland. The justices awarded 15*l.*, which the salvors considered insufficient, and therefore instituted the present appeal.

Bayford was heard for the appellants.

Addams for the respondents.

DR. LUSHINGTON:—This is an appeal from an adjudication by two of her Majesty's justices of the peace for the borough of Sunderland. A salvage service was brought under their consideration, and they determined, after having considered the evidence produced before them, that the sum of 15*l.* would be a fitting reward for the services rendered. It has been truly stated by Dr. Addams that the Court is very reluctant to disturb a decision of this description. In the first place, it relies to some extent on the local skill of the persons who decide it; and, secondly, it is exceedingly inconvenient that in a salvage suit, where the amount to be awarded is under ordinary circumstances a mere matter of discretion, expense should be incurred

Judgment.

Award of the
justices.

Indisposition
of the Court to
interfere.

1857.
January 22.

But their
award in the
present case
quite in-
adequate.

by resorting to another court. At the same time it must be borne in mind that, as long as the legislature admits of an appeal, the judge before whom the case is appealed must exercise his own judgment upon it. If, on the one hand, the award is, upon the whole, fair as between the parties, he will leave the case where he finds it, especially where it is a matter of discretion; but if, on the other hand, it appears to him that the reward is entirely insufficient for the services rendered, then he must act upon his own judgment, and decide accordingly. Then comes the question, whether I consider that 15*l.* is an adequate reward, or nearly adequate, or totally inadequate for the services rendered? The value of the property to which the service was rendered is 1,350*l.* It appears she had the assistance of the steamboat Pilot, of the value of 2,000*l.* What was the real state of the weather, and what were the particular circumstances attending the service, are stated in an irregular manner in this evidence; but I collect from the evidence of the master himself that there must have been considerable urgency to go into port. He does not say, "put a pilot on board my vessel to conduct her to Sunderland," but he offers 50*l.* on his own account. Therefore he must have been urged by the conviction that there was danger to the vessel, which made it worth his while to give more than the ordinary sum for the performance of the service. The salvors performed the service, and performed it successfully. The question is, whether the sum awarded is sufficient? I think the master is not an unfair judge. He offers 50*l.*, and I think if I give the sum which the master himself offered to give I am not guilty of excess. I must pronounce for the appeal, and award the sum of 50*l.*, with costs here as well as before the magistrates.

Stokes, proctor for the salvors.

Rothery for the Messenger.



1857.

January 26.THE ADMIRAL BOXER, JOHN JONES, *Master*.*Collision—Pilot solely to blame—Practice—Costs.*

Where the owners rely upon the misconduct of the pilot to relieve themselves from liability, the wrongful act of the pilot which was the cause of the mischief must be distinctly proved. As a general rule it is the master's duty to repeat, if necessary, the pilot's orders, and for any manoeuvre so carried out the pilot remains solely responsible. When a suit is dismissed because the owners have established the misconduct of the pilot, no costs will be given.

THE Silloth, screw steam-ship, of the burthen of 198 tons, proceeding from Liverpool to Port Carlisle, in Cumberland, shortly after passing the Crosby light-ship, at the entrance of the river Mersey, at 1 A.M. on the 30th of September last, descried the Admiral Boxer, and immediately put her helm to port, and then hard a-port, whereby her course was altered from N.W. by N. to N. by E. The Admiral Boxer, when first seen, was, as represented by the steamer, distant about three miles; and it was said that had she ported her helm, as it was her duty to have done, she would have passed clear of the steamer, but instead of so doing she put her helm a-starboard, whereby, or from other mismanagement, in five minutes from the time she was first seen, she ran into the steamer, doing her considerable damage. The Admiral Boxer, of the burthen of 1,116 tons, was from Quebec with a cargo of timber. On arriving off Port Lynas she took on board a duly licensed Liverpool pilot of the first class. When near the Crosby light-ship, in about mid-channel, she observed the steamer distant about a mile, a little on her port-bow. The steamer in a short time, as stated by the Admiral Boxer, shut in her red light, whereupon the pilot ordered the helm of the Admiral Boxer to be starboarded, by which, if both vessels had continued their respective courses, they would have gone clear of each other, but just as the Admiral Boxer was beginning to answer her starboard helm, the steamer suddenly opened out her red light, when the pilot ordered the Admiral Boxer's helm hard a-port, but there was then no time to avoid a collision. Cross actions were brought by the respective parties. On the part of the Admiral Boxer it was contended, that if she was to blame the fault rested solely with the pilot, who gave all the orders, and whose orders were strictly obeyed.

The *Admiralty Advocate* and *Jenner* were heard for the steamer.

1857.

January 26.*Bayford and Twiss for the Admiral Boxer.*The Court was assisted by Captains *Ellerby* and *Were*.

Judgment.

Charges
brought against
the steamer;
that she was on
the wrong side
of the channel.

That she
ported too late.

Case of the
Admiral Boxer.

Was she justi-
fied in star-
boarding? In

DR. LUSHINGTON, addressing the Elder Brethren, said:—Gentlemen, if you please we will first consider the case of the vessel proceeding, which was a steamer going down the river Mersey, bound for the port of Carlisle. She is charged in the allegation of the vessel proceeded against—first, with having stood over to the wrong side of the channel; and if you are of opinion that the steamer did at any time stand over to the wrong side of the channel, there is an end of this case, because you are well aware that, according to the 297th section of the Merchant Shipping Act, “every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship.” Now, looking at the whole of the evidence in this case, on the one side and on the other, you will deliver your judgment whether you think it has been proved that this steam-vessel did stand over to the wrong side of the channel. The second charge against the steamer is, that she did not port her helm at an earlier period. After considering the evidence, it will be for you to say whether that charge is made out. Thirdly, she is said to be in fault “for having ported her helm, and so crossed the ship’s bows to port when she was too close to the ship, and when, if she had continued her previous course, she would have kept clear of the ship.” The two last charges resolve themselves into one question—whether she ported too late or not? A great deal has been said about the place, about the rate at which the vessels were proceeding, and the distance at which they were descried from each other. We never can have precise accuracy in these matters, and especially in cases where, according to the representation of both sides, the vessels were proceeding at a very considerable speed. Thus stands the case of the steamer. Now with respect to the case of the Admiral Boxer, she states that all the steps taken to avoid the collision were under the pilot’s orders; she states that on the green light and masthead light only being seen, the helm of the Admiral Boxer was starboarded; and on the steamer afterwards opening out her red light and shutting in the green light, the helm was ported. This is her own statement. Now, the first question as relates to this vessel will be, whether you are of opinion that the steamer did so show her green light and masthead light only as to justify the starboarding of the helm. I do not say—I think nobody can—that there may not be cases in which a vessel would be

perfectly justified in starboarding her helm if she saw the green light, but we must always recollect that in ordinary cases both vessels ought to port their helms. Then they say the steamer afterwards shut out the green light and opened the red, and then the helm was ported; that is to say, the shifting manœuvre was justified by the conduct of the steamer. That being so, I now proceed to consider a distinct part of this case, leaving it to you to say whether one or other of the vessels is to blame. I will presume for a moment that the starboarding of the helm of the Admiral Boxer was wrong. I must presume that in order to bring the other question under consideration, namely, whether the order was given by the master or the pilot. This is a very important matter. Dr. Phillimore has stated with great accuracy the judgment I gave in the case of the *Protector* (a). In that case I had a great many difficulties to overcome, because there had been a looseness of practice—I do not say here, but elsewhere—with respect to the presence of a pilot on board, exempting from liability the owners of the vessel. It had stood thus: it had been considered sufficient in two or three instances simply to state that a pilot was on board, and in charge. Now when you come to consider it, nothing was so easy for the party proceeded against as to show there was a pilot on board, and in charge. That sort of defence ought never to be held as sufficient; therefore I went the length of saying—and it was afterwards acquiesced in by the Privy Council—that you must not only show there was a pilot on board, and in charge at the time, but that the collision was brought about by some erroneous conduct on his part, for the Act of Parliament stated the owner should be exempted only by the incapacity or error of the pilot; therefore I threw the burden of proof on those who set up the defence. Upon the present occasion I must candidly state that the pleadings are not at all satisfactory to my mind, because they do not state that there was some specific act by which the pilot wrongfully occasioned the collision; yet perhaps substantially it is intended to say in the defence on behalf of the Admiral Boxer, that the pilot in charge was guilty of error in starboarding the helm. Now we come to the consideration of what was done on board the Admiral Boxer. Clearly the burden of proof lies on those who allege the fact to make it out by the best evidence. Let us see how that stands. The best evidence in the case is that of the persons who were on board the Admiral Boxer. The persons on board the steamer could not know what was done on board the other vessel; they could not know

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some cases a vessel might properly do so upon seeing the green light of a steamer.

Assuming she did wrong in starboarding, did the pilot or the master give that order?

The rule as to exonerating the owners has been more strictly held since the *Protector*.

It must be shown that the collision was caused by the misconduct of pilot alone.

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In the present case the evidence is clear that the pilot gave the order and the master repeated it, which, as a general rule, he would be bound to do.

whether the orders were given by the pilot or the master. Now, what is the case set up by the Admiral Boxer? The witnesses say that the orders were all given by the pilot, and all obeyed by the rest of the crew; that the master repeated the orders which the pilot gave. I have no hesitation in telling you that if, as a matter of fact, you come to the conclusion that the master did not in the first instance give the orders, but repeated them when given by the pilot, the master was justified in so doing, because I have no hesitation in saying this is not a case in which the master would be justified in resisting the pilot. There may be cases in which he would, but there must be strong circumstances, fully proved, which would justify a master in disobeying the orders of a licensed pilot. How does the case stand here? The best evidence is, beyond all doubt, that of the pilot and the master himself. It may, it is true, be said that the master is under some bias; he has a strong motive to excuse himself from having done that which might impute blame to him and bring loss to his owners. With regard to the pilot, if he takes blame to himself the probability is that he is swearing truly. I confess I have heard nothing at present that has in any degree shaken the evidence of the pilot, according to my view of it. He says—"I watched the vessel to ascertain what she would do, and presently I saw only her green and masthead lights, by which I knew she was standing across our bows over to starboard, and over to the port side of the channel. I thereupon ordered the helm of the ship to be starboarded. My order was obeyed." Therefore he takes it upon himself in very direct and explicit terms that he was the person who ordered the helm to be starboarded, and that the order was obeyed. If he is correct, it excludes the notion that the master gave the order before the pilot. The pilot says—"All hands on board the Admiral Boxer were on the alert, and attending to their duty. I had entire charge of the ship as pilot, and all my orders were promptly and efficiently obeyed by the master and crew." The learned judge then referred to the evidence given by the master and some of the seamen on board the Admiral Boxer, and came to the conclusion that it confirmed the testimony given by the pilot.

The Admiralty Advocate wished the Court to look to the protest of the Admiral Boxer, which had not been brought in until late in the cause.

By the COURT:—The protest, gentlemen, states, that about 1 A.M. a steamer's three lights were seen a-head at a considerable distance; that a light was shown over the bows of the ship,

and that by the pilot's orders the helm was ported. It goes on to say, "in a short time the red light of the steamer was shut out, and she crossed our bows until she got on the ship's starboard bow. The pilot then ordered the helm to be starboarded, and we should have cleared the steamer, but she suddenly altered her course." Now, gentlemen, it does not appear to me that this part of the protest does, in the slightest degree, affect the question which I have lately brought under your consideration, namely, whether the pilot gave the order to starboard, or whether the order was given by the pilot and repeated by the master, or whether the master originated it. It does not appear to affect that question in the slightest degree, but it may affect the general conduct of the Admiral Boxer as being inconsistent.

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The Court and the Elder Brethren having retired for consultation, on their return

DR. LUSHINGTON said:—The gentlemen by whom I am assisted are of opinion that blame attaches to the Admiral Boxer for this collision in consequence of her having improperly starboarded her helm; that no blame attaches to the steamer. Then, with respect to the question whether the erroneous order to starboard the helm was given by the master or by the pilot, we are all of opinion that it is proved that the order was not given by the master, but was given by the pilot; and, consequently, that the pilot is to blame for this collision. I wish to add, that I agree with what Dr. Phillimore said, that this is a point in particular which belongs to the Court rather than to the Trinity Masters; but I trust it will be a satisfaction to the parties to know that the Trinity Masters did take it into their consideration, and we all of us entirely agree upon it. The suit must be dismissed; but I believe, where it has been held that the fault was that of the pilot alone, the Court has never given costs, nor shall I do so on the present occasion.

The pilot was
solely to blame
for giving the
order to star-
board.

Suit dismissed,
but without
costs.

Gostling, proctor for the Silloth.

Tebbs for the Admiral Boxer.



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January 30.THE BARTLEY, JAMES STOTHARD, *Master*.*Salvage—Salvage of Life—Separate Suits—Costs.*

In a suit for salvage the Court will now, whatever it may have done before the passing of the Merchant Shipping Act, always take into its special consideration the salvation of human life, and give a corresponding reward.

The Court will also protect the owners, where the expenses have been increased by separate suits having been brought by two sets of salvors, and the interest of the one set has been denied by the other.

THIS was a suit promoted by the steam-tug *Sampson*, the *Ramsgate* life-boat, and three luggers, to procure salvage compensation for services rendered to the brig *Bartley* on the 24th of September last. A second action was entered on behalf of a smack called the *England's Glory*, the crew of which boarded the *Bartley* some little time after the other salvors. The brig, of the burthen of 189 tons, partly laden with timber, on a voyage from Southampton to Sunderland, got upon the south part of the Goodwin Sands, as alleged by the salvors, in a very dangerous position. Tar-barrels were burned and guns fired to attract attention. These were responded to by the salvors, who, as they said, at great risk to their lives, succeeded in reaching the brig, which, after much labour on their part, was conducted to Ramsgate Harbour. On the part of the owners it was contended, that the vessel came off by the rising of the flood-tide, and not by the exertions of the salvors. The first set of salvors submitted that there was no occasion for the interference of the *England's Glory*, as they were fully adequate to rescue the brig. The value of the property saved was 1,250*l.*; and a tender was made of 250*l.*, which the salvors rejected.

Jenner and *Swabey* appeared for the first set of salvors.

Addams for the second.

Bayford and *Spinks* for the owners.

Judgment.

DR. LUSHINGTON:—With regard to the amount which has been paid into Court as a reward for these salvage services, I am clearly of opinion that it is insufficient, because I look in this case, as I am bound to do, not merely to the value of the property saved, which is 1,250*l.*, but also to what I conceive was effected on the present occasion, namely, the rescue of persons

from imminent danger on the Goodwin Sands, and that at the risk of the lives of the persons who engaged in the service. Whatever might be the state of the law antecedent to the passing of the Merchant Shipping Act, it is clear that the Court is now bound to take into special consideration the salvation of human life, and to give a corresponding reward. Therefore, instead of the sum of 250*l.*, I shall award 400*l.* I have no doubt that those salvors represented by Dr. Addams are entitled to share with the others. Not that I think the merits of all are equal; the greatest merit is due to those who went on board the life-boat and incurred the greatest danger, but it is probable the life-boat could not have been brought to the place where the vessel lay, save through the assistance of the steamer. With regard to the luggers, it appears to me, from a consideration of the papers, that they all went off about the same time; it signifies but little whether one went off five minutes sooner or later than the other. They all went to the place at considerable risk to themselves, for the vessel was lying aground on the Goodwin Sands. I think it has been a grave error on the part of the salvors represented by Dr. Jenner to attempt to exclude the men from the England's Glory. Therefore I shall pronounce for the party for whom Dr. Addams appears; and I must mark my sense of the error which has taken place in not consolidating the actions. In order to do justice to the owners, I shall order that from the taxed costs of the party represented by Dr. Jenner there shall be deducted 25*l.*

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Court, since the passing of the Merchant Shipping Act, will take into its special consideration the salvage of life.

Will protect owners against separate suits by different sets of salvors.

Dr. Addams:—May I ask the Court to state the sum which it thinks should be given to the salvors on board the England's Glory?

The Court:—I will give my opinion upon it next Court-day (a).

Jenner, proctor for the steam-tug Sampson and other boats.

Rothery for the England's Glory.

F. Clarkson for the owners of the Bartley.

(a) After the breaking up of the Court, the judge apportioned 62*l.* 10*s.* to the England's Glory out of the salvage awarded.



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January 30.H. M. S. INFLEXIBLE, W. R. MADGE, *Commander*.*Collision—Objection to Report of Registrar and Merchants on Amount of Damage—Restitutio in Integrum—Consequential Damages—Demurrage.*

In estimating damages arising from a collision and the amount to be paid by the wrong-doer :

Held, that an outlay, merely probable, but discretionary had there been no collision, cannot be deducted from a charge made indispensable by the collision. Discount ought to be deducted if it has been received, or might have been if demanded ; if the Registrar and Merchants have no *constat* of that, but are of opinion that the bills for repairs are above the fair rate of trade charges, they should make a deduction on this score. Compensation for the nonemployment of the ship during repair is a part of *restitutio in integrum*, and itself consists of the expense of detention and the amount of profit lost. Peculiar expenses arising from customs of ships employed in East India voyages to be allowed for.

THIS was an objection to the Registrar's Report in a case of collision in which H. M. S. Inflexible had been found to blame (a). The Registrar and Merchants had made large deductions from several items of the amount of damage claimed by the owners of the Soubahdar. The report was objected to on behalf of the owners, and supported on behalf of the Admiralty. The particulars are sufficiently stated in Dr. LUSHINGTON's judgment. The case was argued on the 30th of January by Addams and Twiss for the Soubahdar, H. M. Advocate and the Admiralty Advocate for the Inflexible. The Court reserved its judgment.

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Judgment.

Facts of the
case.

Sum claimed
and allowed.

DR. LUSHINGTON:—It is needless to repeat the general principles which usually govern the Court in receiving a report of the Registrar and Merchants, or to reiterate the observations so lately and so frequently made as to the measure of indemnification in damage cases. I proceed at once to the facts of this case. The vessel which received the damage was the Soubahdar, of 624 tons new measurement, and the collision occurred in the Channel, she being on her return voyage from the East Indies, such voyages out and home being her accustomed trade. The indemnity claimed is 4,616*l.* 8*s.* 5*d.* ; the sum allowed is 3,133*l.* 18*s.* 4*d.* The amount deducted is therefore 1,482*l.* 10*s.* 1*d.* This, no doubt, is a large deduction, and the Court is, for every reason, desirous of discouraging exorbitant claims ; it must not, how-

ever, prejudice the question by always assuming that a great difference between the sum claimed and the sum allowed is conclusive proof that the demand is unreasonable; before such a conclusion can be arrived at, investigation is necessary, and the cause of difference must be considered; for the Court is aware that no principle has been laid down, nor probably can be, to meet all cases, and that, under some circumstances, the application even of acknowledged principles is difficult. Upon the present occasion I have very little evidence to assist me, and, save from the papers and the argument of counsel, and the explanation from the Registrar which I have called for, I cannot know what took place before the Registrar and Merchants. The counsel for the Crown rely mainly upon the report itself; and, no doubt, they are entitled to ascribe great weight to the opinion of the Registrar and Merchants, on whose knowledge, experience, care and impartiality the Court reposes full trust. But, after all, I must, subject to these considerations, judge for myself. I have made up my mind to refer this report back to the Registrar and Merchants for further consideration, and I will now state the particulars. No. 2 is the item for towing the ship from the Downs to Gravesend: the claim is for 50*l.*, which is admitted to have been paid; 20*l.* has been taken off on the ground that, if there had been no collision, the 20*l.* would have been paid in hiring a tug to tow the vessel for the sake of greater expedition, and that it might be that money would be saved by so doing. It appears to me, however, that the incurring such expense in ordinary cases is purely optional, and most clearly is not a measure of necessity but one of expediency, which may or may not be adopted according to the judgment of the master, and according to the state of the wind and weather, and indeed other circumstances. The vessel being disabled by the collision, the employment of the tug was a matter of necessity; but if there had been no collision, there would have been an option of employing the tug or not as he liked. I am of opinion that a merely probable, but discretionary, outlay cannot be deducted from a charge made indispensable by the collision. The next item is No. 8, the painter's bill, claim 80*l.* 14*s.*, allowed 60*l.* 14*s.* This bill is for painting the ship with three coats of paint. Captain Umfreville states that, in consequence of the ship being shaken, it was necessary to caulk her all over; that the Lascars were lodged in the cabins of necessity whilst the bows were under repair; that the ship was painted all over, inside and out, and that this was rendered necessary solely in consequence of the collision. I am not, from these premises, able to draw the same conclusion as Captain Umfreville. I cannot think that the

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Report to be referred back.

Towage, generally an optional expense, was rendered necessary by the collision.

Painter's bill.

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spars.Discount to be
deducted where
it has or might
have been re-
ceived ;or excessive
charges to be
reduced where
there is no
constat of dis-
count.

injury sustained by the ship, and the consequences arising therefrom, made a painting of the whole, inside and out, a necessary consequence of the collision, and I confirm the report in this respect. No. 9 is the mastmaker's bill; claim 207*l.* 7*s.* 9*d.*, allowed 177*l.* 17*s.* 3*d.* This deduction, as I understand the case, stands on two grounds. First, that certain articles are charged for in this account, the loss of which could not have been occasioned by the collision; the amount is but small, 15*l.* 2*s.* 6*d.* Captain Umfreville swears positively that these articles, the oak martingale, &c., &c., were actually carried away or destroyed by the collision. The propriety of admitting this claim rests entirely upon the question of fact; on the one side I have a positive statement on oath uncontradicted by any evidence, on the other I have the opinion, the deliberate judgment, of the Registrar and Merchants; but opinion of my own I have none, for I cannot undertake to say that the destruction of these articles could not have been occasioned by the collision. As I intend to refer the report back, so I shall also refer back this particular deduction from the claim, and with the following direction; that the Registrar and Merchants shall reconsider it, and if upon reconsideration they should be of opinion that it was impossible these articles could be carried away by the collision, the deduction shall stand, and to this question Captain Embleton's attention should be particularly directed. If the Registrar and Merchants cannot come to the conclusion that such a loss by collision was impossible, then I am of opinion that credence ought to be given to the affidavit of Captain Umfreville and the amount be allowed. From this item a further deduction of 14*l.* 8*s.* was made on account of discount. It appears to me that discount ought to be deducted in all cases where it has actually been received, or might have been if demanded, and such facts ought to be ascertained, as far as may be, by the Registrar and Merchants, and should guide their judgment; if the charges in a bill are very high, that circumstance favours a supposition that discount had been or would have been allowed, but it is not conclusive proof. In such a case, I think that the safest course is to reduce the extravagant charge to a just and proper rate, by reduction on the principle of the charge being too high, though not on account of discount specifically, neither proved nor admitted. Before the Registrar and Merchants, perhaps, there was no evidence to prove that no discount was taken, and they, being of opinion that the charges were unusually high, not unnaturally came to the conclusion that discount must have been allowed; but now I have the affidavit of Captain Umfreville, in which he positively swears that no discount was allowed. I do

not at all comprehend why two receipts, bearing date the one in February and the other in April, should have been produced, and no satisfactory explanation has been offered. I am not surprised that this circumstance awakened suspicion in the minds of the Registrar and Merchants. Were this the only item under consideration, I should not refer it back, but as the report is to be referred for further consideration, I shall direct that this item be reconsidered also; and on this principle, that the discount being denied on oath, it should not be allowed as a deduction; but if they should be of opinion that the charges are higher than the fair rate of tradesmen's charges, they should make on that account a fitting deduction. The next item to be considered is No. 14, the ropemaker's account; the claim was for 242*l.* 14*s.* 9*d.*, from which 56*l.* is deducted. I have no small difficulty in encountering this item; all the evidence I have is to be found in the affidavit of Captain Umfreville, *ex parte* evidence and no more; that affidavit contains very positive testimony, and in the words following: "And this deponent further made oath, that the account marked No. 14 of Messieurs Robertson does not contain charges for more rope than was actually required by the said Soubahdar in consequence of the damage done to her rigging by the said collision, and the quantity of cordage charged for in the said account was actually supplied to and used on the said ship solely to put her in the same condition she was in prior to the said collision; and that the principal portion of the said ship's rigging which was restored was carried and cut away in consequence thereof, and that what remained of such rigging was necessarily used for stage and shore ropes whilst the said ship was undergoing repair; and that deponent and his co-owners realized no benefit or advantage therefrom." It seems to have been the opinion of the Registrar and Merchants that so large a quantity of rope could not have been necessary to repair the consequences of the collision, particularly as there was another bill for wire-rope. I presume that this, their opinion, must have been mainly founded upon the tonnage of the vessel and the sort of collision which actually occurred; for it is evident, as I conceive, that from these two data the conclusions must be drawn. Then the Court is placed in this embarrassing position, that it has before it the opinion of the Registrar and Merchants, unsupported by any affidavit or any explanation of fact, opposed to the positive affidavit of Captain Umfreville, which was not before the Registrar and Merchants. I think it right, also, that this item should be reconsidered with the affidavit of Captain Umfreville, and with a further explanation, regard being had to the particular species of collision, of what

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Cordage and
rigging.

The opinion of
the Registrar
and Merchants
opposed to the
positive affi-
davit of the
master.

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Demurrage.

Consequential
damages no-
where defined.Detention and
loss of profit.

In estimating
the cost of de-
tention, special
circumstances
should be con-
sidered; as
the Lascars in
the present
case, and the
custom of ships
in the East
India trade.

rigging was destroyed or cut away: with such further evidence and explanation I leave this question to their judgment. I am thankful to say I have at last arrived at the concluding item, the most embarrassing of all, the question of demurrage, No. 18. The claim is for 1,506*l.* 18*s.* 6*d.*; from this 882*l.* 18*s.* 6*d.*, more than half the amount claimed, is deducted. This is not the case of a total loss, and I shall not complicate the case by referring to principles applicable to that. When a ship is partially damaged the principle is clear, *restitutio in integrum*; the application often difficult. First, then, as to consequential damages, an expression the precise meaning of which has not, to my knowledge, been defined by any authority, nor do I mean to attempt it. In the present case, regard being had to the particular circumstances, *restitutio in integrum* is the amount of loss sustained, and that amount consists of the expense of repair and a just compensation for the non-employment of the ship whilst under repair; and that just compensation must again consist of the expense of detention and amount of profit lost. Such, I apprehend, are the general principles which a judge at *Nisi Prius* would lay down for the direction of a jury in a case in which it was their duty to assess the damage. If I am right in these positions, then there is, first, the expense of repair, already discussed; secondly, the expenses attendant upon the detention; thirdly, the amount of profit lost. The expenses attendant upon detention must greatly vary according to the facts of each case. I cannot attempt to enumerate them; but though there may be many cases in which such questions may be disposed of satisfactorily by a general rule, yet when particular circumstances occur, I am of opinion that the claimants are entitled to have them taken into consideration. The detention of the Lascars appears to me to be one of the circumstances fit to be considered. I shall refer back this item with instructions that the Registrar and Merchants shall consider the expenses of retaining the Lascars a necessary expense, and also so many of the European officers as were requisite to be retained, not only for the care of the Lascars, but according to custom on board vessels engaged in a continuous trade with the East Indies; by which I mean that, if it be usual to retain and pay European officers on board such a vessel until the time of her commencing a new voyage, allowance shall be made for such expenses from the period at which she would probably have sailed if there had been no collision up to the period when the repairs ought to have been finished and the vessel ready for sea. My observation, therefore, applies to the officers necessary for the care of the Lascars, and also to the other European officers, if it be the custom to retain

and pay them. The last head is indemnity for the loss of time during the detention, and this must be estimated upon the principle, as near as may be, of what would certainly or most probably have been obtained if there had been no collision; and as to the time for which such compensation must be made, it ought to be reckoned from the period when the vessel, in the ordinary course, would have been ready for sea if there had been no collision, up to the period when with due diligence the repairs ought to have been completed. In all these cases it must be borne in mind that the party condemned to pay damages is legally speaking a wrongdoer, and that full compensation is due (a).

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Loss of profit
on time, how
reckoned.

F. Clarkson, proctor for the Soubahdar.

W. Townsend, proctor for the Admiralty.

(a) On the 27th of February the Judge, after communicating with the Registrar, pronounced the sum of 3,515*l.* 0*s.* 10*d.* to be due to the owners of the Soubahdar, being 381*l.* 2*s.* 6*d.* above the amount reported by the Re-

gistrar and Merchants. This sum was made up as follows: 20*l.* additional for towage, 15*l.* 2*s.* 6*d.* on the mastmaker's account, 46*l.* on the account for cordage, and 300*l.* additional for demurrage.

THE COROMANDEL, G. ANDERSON, *Master*.

Salvage—Salvage of Life—Priority—17 & 18 Vict. c. 104, Sects. 458, 459—Derelict.

Preservation of human life is made, by the Merchant Shipping Act, a distinct ground of salvage reward, with priority over all other claims for salvage, where the property is insufficient.

Where a master and crew leave their ship for the safety of their lives, a mere intention of sending a steamer to look for her does not affect the question of derelict.

THIS was an action brought by the fishing smack William, and two steam-tugs, the Volunteer and Robert Owen, against the barque Coromandel, to obtain salvage compensation for services rendered to her on the 29th and 30th of September, 1856, in the North Sea. There was also another action brought by the fishing smack Young Frederick to procure compensation for having saved the lives of the master and part of the crew of the Coromandel. It appeared from the pleadings, that the Coromandel, which was a barque of 638 tons, and had a crew of twenty-four hands, including the master, was bound on a voyage from Archangel to London with a full cargo of timber, when, on the evening of the 27th of Sep-

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February 27.

tember, 1856, she struck on a sand called the Ridge. The wind was blowing a heavy gale at the time, and the vessel struck so heavily, that her bottom was knocked out, her main, fore and mizen masts were carried overboard, some of the cargo was washed out of her, and her chain-cable from the lockers went through her bottom. The ship after a time came off into deep water, when her anchor was let go and she was brought up. At about 8 A.M. of the following morning the chief mate and eight of the crew succeeded in getting on board a schooner which was bound northward; and in the afternoon of the same day, the smack Young Frederick having come up, the master and the remainder of the crew, fifteen in number, abandoned their vessel and went on board the smack, and were safely landed at Yarmouth at daylight of the following morning. The master immediately applied to his agents, Messrs. Rutchcr, for a steam-tug, and accordingly, at the request of Messrs. Rutchcr, the steam-tugs Volunteer and Robert Owen proceeded in search of the barque, the master of the Coromandel being on board the latter tug, and at about 2 P.M. the same day fell in with her. In the meantime the barque had been fallen in with at about 7 o'clock that morning by the fishing smack William, which had remained by her until the steam-tugs came up. Steps were thereupon taken to bring her to a port of safety; and by the united exertions of the salvors, the two steam-tugs towing a-head, and the smack being fastened astern to steer her, the barque having lost her rudder, she was ultimately, at about 9 A.M. of the 30th of September, placed on the beach in Yarmouth Roads to the south of the Wellington Pier. It was averred by both sets of salvors, that they had encountered great risks in rendering the services in question, which was however denied by the owners; and it was further stated on behalf of the Young Frederick, that the crew, when taken out of her, were greatly exhausted. The value of the property salvcd was 2,519*l*.

Robinson and Jenner for the smack William and the two steam-tugs.

Deane for the Young Frederick.

Addams and Twiss for the owners of the Coromandel.

Judgment.

DR. LUSHINGTON:—I will state, in the first instance, what my view is as to the intention entertained by the Legislature, as expressed in the Merchant Shipping Act, with regard to the

saving of life. I apprehend the Legislature, in the first place, was well aware that there were many instances in which life was saved and property entirely lost, and that consequently there was no reward which could, as a matter of right, be claimed by those who, perhaps at the risk of their own lives, had saved the lives of others, and they meant to provide for that contingency in the first instance. I apprehend that they intended, secondly, to empower the Court to do what it was never empowered before to do, namely, to give a reward for saving life as part of the salvage services performed; for, strange to say, this Court had not the power so to do, though there had been a section introduced in one of the Acts of Parliament relating to the port of Dover, and the Court there had the power to give a reward for saving life. Therefore I apprehend the second object was to say, "Wherever life has been saved you shall take that into consideration, and give a reward accordingly." Now, what does the statute say?—"Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person in assisting such ship or boat; in saving the lives of the persons belonging to such ship or boat; in saving the cargo or apparel of such ship or boat, or any portion thereof; and whenever any wreck is saved by any person other than a Receiver within the United Kingdom;—there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services"—that includes the whole three services, and not one only—"or any of them are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage), to be determined in case of dispute in manner hereinafter mentioned." Now, I conceive that to be a very comprehensive enactment—enabling this Court, where property has been saved of any description, in any way whatsoever, in the nature of wreck or salvage, to reward not only for any one, but for all three of the cases mentioned at the commencement of the section. The section which follows is for another and different purpose:—"Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage." Therefore I take it, that if it was necessary to divide this and ascertain how much was due for saving life, and I was of opinion that the property

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Board of Trade
empowered to
reward salvage
of life;

and this Court
likewise.

17 & 18 Vict.
c. 104, s. 458.

Sect. 459 gives
priority to the
reward for sal-
vage of life,
when the pro-
perty is insuf-
ficient.

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The present case substantially one of derelict; the master and crew left her to save their lives, and though they might intend to send a steamer to look after her, that cannot affect the question.

was not sufficient to enable me to reward both those who had saved the ship, and those who had saved the lives, according to the terms of this section, the latter would be a prior claim. "And in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may, in its discretion, award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." Therefore, I think the Legislature intended that priority should be given to those who have been instrumental in saving life. If sufficient property has not been saved to remunerate the parties, then, so anxious were the Legislature to provide for every contingency, that they were to be paid out of another fund. I think there is no blame attributable to the parties for having instituted separate suits. The actions have been consolidated, and I do not think the owners have been put to any expense whatever which was not entirely justified by the circumstances of the case. Then, as to the circumstances, I am of opinion that it is substantially a case of derelict, because I take it to be quite clear, looking at the evidence, that the master and all the crew would, if they had had the opportunity on the 28th of September, have gone on board the schooner which removed some of them. I have no hesitation in saying that the declaration made before the Receiver of Droits is to that effect, though not in so many words; and the fact of the men quitting the vessel is the strongest proof of the state the vessel was in. It was only for the preservation of their lives that they resorted to that measure. Then with regard to the second point: the master and part of the crew, fifteen in number, go on board the *Young Frederick*, and, according to the statement of the master himself, the salvors made great exertions to save them, at the risk of their own vessel. Would they have made those exertions unless they considered their lives in peril? for the *Young Frederick* must have been incapable of rendering any service to a ship of 638 tons, dismasted and waterlogged. It is quite manifest it could only be for the purpose of saving life that the *Young Frederick* undertook this service. It may be perfectly true that the master and these fifteen men, when they had got on board the *Young Frederick*, and were sailing away to Yarmouth, intended, if possible, to employ steamers to go and rescue the vessel, which was at no great distance. But is not that the case every day? A master and crew abandon a vessel for the safety of their lives; he does not contemplate

returning to use his own exertions, but the master hardly ever abandons a vessel on the coast without the intention, if he can, to obtain assistance to save his vessel. That does not take away from the legal character of derelict. These services appear to have been rendered to a vessel in great necessity. The value is 2,500*l.*, and I do not think I shall give too much if I give 200*l.* for saving the lives of the fifteen men by the Young Frederick. With respect to the other salvors they saved the property, and very meritoriously. They consist of twenty men, one smack, and two steam-tugs, and I shall allot to them the sum of 500*l.*

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Jenner, proctor for the smack William, and the steam-tugs Volunteer and Robert Owen.

Skipwith for the fishing smack Young Frederick.

F. Clarkson for the owners of the Coromandel.



THE SPIRIT OF THE AGE.

Salvage—Unnecessary Affidavits—Practice.

In a suit for salvage the owners gave, in substance, an affirmative issue to the facts alleged by the salvors, and the Court refused to allow the salvors the costs of several affidavits brought in by them, especially as such affidavits were made by persons who would have been within reach if their evidence had proved to be necessary; when, however, it is probable that witnesses may not be accessible at a later period, parties may be justified in securing their affidavits at the outset.

THIS was a salvage suit brought by the steam-tug Secret against the barque Spirit of the Age. On the 5th of January, 1857, in consequence of the extreme violence of the gale, several vessels in the neighbourhood of the Downs were exposed to great peril. The Secret went out to render aid, and, seeing the barque begin to drive fast to leeward, with her head towards the rocky shore, she made all speed towards her. The master ran the tug under her stern, and, having hailed her crew to get a hawser ready, brought the tug along the leeward side of the barque, and across her bows, until the tug's stern was off her weather bow. Various manœuvres were adopted, attended with the greatest risk to the tug, and ultimately, although the barque had once reached within

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a ship's length of the beach, the tug succeeded in towing her into deep water. The value of the property salvaged was 62,000*l.* The owners gave an affirmative issue to the statement of the salvors.

Bayford and *Spinks* appeared for the steam-tug.

Addams and *Twiss* for the barque.

Judgment.
Statement of
salvors ad-
mitted by the
owners to be
true.

In such a case
the Court will
not allow the
expense of
getting up affi-
davits in sup-
port of the
salvors' state-
ment, if the
witnesses are
accessible.

DR. LUSHINGTON :—There is a long statement given in by the salvors, a very clear and very proper statement, of the services rendered to the vessel proceeded against, and there comes in reply what is in substance an affirmative issue, or, in other words, all the facts and circumstances stated on behalf of the salvors are admitted to be true. It is their own fault if they have omitted any material fact, and the owners are entitled to say, "That is the whole that could be brought against us, and which we are prepared to meet, knowing it to be true. To save expense, therefore, we admit it." What could be more convenient than that such a course should be resorted to? Here, however, there are eighteen or nineteen affidavits, many of them relating to subsidiary facts, and many relating to other vessels, thus unnecessarily augmenting the expense. I am clearly of opinion that I should not be justified in allowing the expenses of printing the affidavits; but I agree to this, that where the proceedings are commenced, either by act on petition or otherwise, when there is any reason to expect that the persons whose evidence may be desirable will not be accessible at a future period, affidavits may be taken, and will be viewed by the Court favourably, as a matter of prudence on the part of those who had to advise the owners in the case. But I have looked over the whole of these affidavits, and I think that all the material witnesses could have been procured at any time. There is, however, one point with respect to which there is a difficulty, and that is with regard to the damage sustained by the steam-tug and the expense of the repairs. Though this is not very satisfactorily pleaded, yet the fact I apprehend to be that there was considerable damage sustained by the steam-tug, the extent of which, however, has not been ascertained. I think, therefore, it is consistent with justice and equity to make an allowance on that account. I decline to make any allowance for printing the affidavits, or for taking the affidavits, except those which relate to the damage sustained. With respect to the merits of the case, it is admitted on all hands that this is a property of very great value, namely 62,000*l.* It was a service of great value, and admirably

performed, and the Court is disposed to be as liberal as it can be, with a view not merely to reward the services rendered, but to encourage seamen to undertake such enterprises, by giving an ample reward to those who risk their lives in preserving the property of others. I shall give the sum of 3,500*l.*, with costs, except those which I have stated.

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Rothery, proctor for the salvors.

F. Clarkson for the Spirit of the Age.

THE PENSHER, JAMES OSBORNE, *Master*.

Collision—Subsequent Damage—Burden of Proof.

A collision took place between vessels A. and B. After the collision B. anchored, and subsequently drove on shore, by which further damage was done to her, and salvage expenses incurred. The owners of A. admitted their liability to make good the damage directly caused by the blow between the vessels, but denied their liability to the further damage and expense arising from the driving on shore:

Held, on objection to the report of Registrar and Merchants, which allowed for both kinds of damage, that where parties object to being made liable to such damage, the burden of proof is on them to show that such damage, subsequent to the collision, arose from want of ordinary nautical skill and prudence in the master of the damaged ship.

THE schooner *George*, a vessel of eighty-six tons register, was riding at anchor in Yarmouth Roads, the wind blowing very hard, when, at about 10.30 A.M. of the 18th of December, 1855, she was run into by the brig *Pensher*, which struck her with great violence on her starboard bow, causing the schooner's chain to part. The schooner sustained great damage in spars and rigging by the collision; and the two vessels, having ranged alongside each other, then drifted together down the Roads, and towards the shore, for about a mile and a half, when the crews at length succeeded in clearing them by cutting away the rigging. The *Pensher* then continued to drift until she came to the beach, but the master and one of the crew of the *George*, who had remained on board their vessel (the other three having abandoned her, and gone on board the *Pensher*), having let go the schooner's best bower anchor and thirty fathoms of chain, at about 11 A.M. brought her up. At

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about this time a boat from the shore put four hands on board her, and fifteen fathoms more chain having soon afterwards been paid out, the schooner continued to ride in safety through the remainder of that day and the following night, the wind increasing in violence until it blew a heavy gale from S.E. and by E. At about 8 A.M. of the 19th of December, the best bower chain parted, and the schooner then came to the beach, and sustained further considerable damage.

An action was entered by the owners of the *George*, to which an appearance was given on behalf of the owners of the *Pensher*, and on the 17th of June, 1856, a decree by consent, as it is called, was taken, the owners of the *Pensher* admitting their liability for damage immediately arising from the collision, but not for the subsequent damage resulting from the schooner having gone on shore, and the whole question was thereupon referred to the Registrar, assisted by two Merchants.

On the part of the owners of the *Pensher*, it was alleged that they were not liable to make good the damages occasioned by the *George* having gone ashore, for that it was due entirely to the negligence and unseamanlike conduct of the master of the *George* in not having paid out a sufficient quantity of chain, which he could easily and ought to have done, as many other vessels lying nearer the shore than the *George* did, whereby they rode out the gale in safety. On the part of the *George* it was alleged that the schooner was so near the shore that it was impossible to pay out any more chain, and that if more chain had been paid out she would probably have struck the ground aft, and broken up. The owners of the *George* brought in a claim for the damage, amounting to 672*l.* 12*s.* 1*d.*; on this the owners of the *Pensher* tendered 375*l.*, a sum amply sufficient to cover the damages immediately arising from the collision, but not the subsequent damages of going ashore. This tender was rejected. A great number of conflicting affidavits were brought in on the one side and the other, and the matter then came before the Registrar and Merchants, by whom the case was fully considered, and who came to the conclusion that the objection of the master of the *George* to paying out more chain was, under the circumstances, reasonable; that he was not responsible for the schooner's going ashore, and that consequently the owners of the *George* were entitled to recover the whole of the damages, as well those immediately resulting from the collision as those arising from the vessel having gone ashore; and they allowed 653*l.* 16*s.* 2*d.* as the amount of those damages.

To this award an objection was taken on behalf of the owners of the *Pensher*, and the case came on before the Judge, assisted by Captains *Farquharson* and *Pitcairn*.

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Bayford and *Deane* for the *Pensher*.

Jenner and *Spinks*, *contrà*, were not called upon.

DR. LUSHINGTON, addressing the Elder Brethren, said :— Judgment.
Gentlemen, As we are all agreed upon the decision at which we must arrive, it is unnecessary to hear counsel on the other side ; but I must state the principles upon which every decision, under circumstances like these, must be founded. The case of the *Countess of Durham* (a) has been referred to, and I will presently show that that case was decided according to the rules which I am about to lay down. It is admitted that the *Pensher* is to blame for the collision, and the consequence of this is, that all the damage arising from that collision must be borne by the *Pensher*, unless it can be shown by clear and positive evidence that any part of that subsequent damage arose from gross negligence or great want of skill on the part of those on board the vessel damaged. The Court has on many occasions had objections of this kind raised before it in another shape. It has been contended sometimes that a vessel run into and abandoned by her crew has been improperly abandoned. The Court has always said, that if it could be proved that the abandonment took place when the parties might have known to a certainty that their lives were not in danger, then the Court would take that into consideration. Again, sometimes it has been contended that the parties who received the damage, instead of going into a proper port, have gone into an improper port, and there the Court has always said that the *onus probandi* is on the party alleging that negligence, want of skill or knowledge, distinctly to prove it. On the present occasion, see how the case stands. The case has been subjected to examination before the Registrar and Merchants, one of whom is a nautical gentleman. It has undergone a very accurate examination, as far as I can judge, from the numerous papers laid before the Registrar and Merchants, and they have reported that, in their opinion, the whole damage arose from the collision, and not from any fault or default on the part of the master of this vessel, the *George*. Here, then, is another presumption which those who impugn the judgment of the Registrar and Merchants have to

Principles on which this case must be decided.
Pensher alone to blame for the collision—must therefore bear the whole loss, unless he can fix the other party with subsequent gross negligence or want of skill.
Cases of improper abandonment.
Going to the wrong port.
Registrar and Merchants are of opinion that the master of the *George* was not guilty of misconduct.

1857.

March 5.Facts of the
case.Was it want of
common pru-
dence not to
let out more
chain?Case of the
Countess of
Durham.

encounter; for, I apprehend, nothing is more clear than that, where there has been a deliberate report made by the Registrar and Merchants, those who take an objection to it are called upon to prove, in the first instance, that the objection is well founded. It appears that, in consequence of this collision, the *Pensher* went on shore, that the *George* brought up, and that when close to the shore—whether within one or two cables' lengths, I do not stop to inquire—she let out forty-five fathoms of cable; and the only charge imputed to her, and the only one necessary for me to notice, is, that she did not let out more chain. With regard to not using the other anchor, the *Trinity Masters*, for nautical reasons which I need not specify, are of opinion that that course was out of the question. The case then comes to this: it was very properly put by Dr. Bayford, that it was want of common prudence not to let out more chain. If he could establish that position, undoubtedly he would be entitled to the decision of the Court; but we are all of opinion that it is impossible for him to do so. Now let me call attention to the case of the *Countess of Durham*. In principle it is in point, but I shall not detain you by going through the facts. In that case there were complicated circumstances; it was a case of damage done to the *Johns*, and the question was whether she had resorted to proper measures after the damage had been done. It was stated on the one side that "the stranding of the *Johns* was solely owing to the unseamanlike conduct, want of judgment and mismanagement of her master and crew; for that for six hours after the collision, and prior to the *Johns* getting under weigh, she rode in perfect security; that if the master knew that the trysail was an insufficient substitute for the mainsail, it was his duty not to have got under weigh till it was repaired—which might have been done." Now, I put the question in these very words: "Whether, after the collision, the master of the *Johns*, considering the damage his vessel had received, the place he was in, and the state of the weather, took such measures as ought to have been taken by a master of ordinary nautical skill and experience; I say of ordinary nautical skill and experience, because you are not to expect from the master of a vessel like this such a perfect acquaintance with nautical science as belongs to a higher class of officers." Now, in answer to that, the gentlemen, by whom I was assisted, said: "We think the master of the *Johns* did not exercise a sound judgment in the proceedings subsequent to the collision." I was not satisfied with that answer, because, if I had received it, I could not have come to the conclusion that the master of the *Johns* was to blame, because the mere question of the exercise of judgment, whether sound or

not, would not have been sufficient to attribute what occurred to culpable neglect or want of knowledge: but I put the question again. And they further said, in answer to such inquiry, "that he did not exercise such a judgment as a master of ordinary skill and experience should have done." Now, gentlemen, in the present case, the question I shall put to you is simply this: whether, under all the circumstances of this case, you are of opinion that the master, in omitting to let out more chain, was guilty of gross negligence, or was thereby shown to be deficient in ordinary seamanlike skill and knowledge? The answer of the gentlemen is, that if more chain had been let out, it is possible, considering the state of the wind and weather, but not at all certain, that the vessel would not have broken from her chain; and that the master, in not letting out more chain, was not guilty of negligence or unseamanlike conduct. I therefore overrule the objection, confirm the Registrar's report, and pronounce against the *Pensher* with costs.

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In the present case there was no want of ordinary seamanlike skill and knowledge.

Pensher condemned in the whole damage received, and costs.

From this decree an appeal was prosecuted to her Majesty in Council, and on the 29th of June following, the Lords of the Committee (a) were pleased to affirm the decision of the Court below, and condemn the appellants in the costs.

Affirmed on appeal.

Jenner, proctor for the schooner *George*.

Rothery, proctor for the *Pensher*.

(a) The Lords present were, the Right Honorable Lord Justice Knight Bruce, Lord Justice Turner, Sir Edward Ryan and Sir John Dodson.

THE TICONDEROGA, G. F. BOYLE, *Master*.

Collision—Ship under Charter—Exemption from Liability—Compulsion.

The *Ticonderoga*, under charterparty to the French government, was towed by a steamer athwart the hawse of the *Melampus*. The *Ticonderoga* alleged that she was not liable for the damage done, as her charterparty obliged her to obey orders and put herself in tow of the steamer:—Held, that such obligation was no compulsion, so as to lay the ground for exemption from liability for the damage done; as it arose from a voluntary stipulation entered into by the owners themselves.

THIS was an action brought by her Majesty's ship *Melampus* against the American vessel *Ticonderoga*, to recover the loss arising from a collision between them in the Golden Horn,

March 6.

1857.
March 6.

Constantinople, at 5 p.m. on the 27th of July, 1855. The *Melampus* was lying at anchor with her jibboom rigged in to prevent accident, when the *Ticonderoga*, in tow of the steamer *Sea Nymph*, came athwart hawse of her, doing her considerable damage. The *Ticonderoga*, in her defence, alleged that she was in the service of the French government; that the *Sea Nymph* was attached to her by order of the French intendant; and that she was towed against the *Melampus* by the *Sea Nymph*, for which, under the circumstances, she, the *Ticonderoga*, was not responsible.

The *Queen's Advocate* and the *Admiralty Advocate* were heard for the *Melampus*.

Addams and *Twiss* for the *Ticonderoga*.

Judgment.

DR. LUSHINGTON :—It seems to me expedient, in the first instance, to state as clearly as I can what are the facts which raise the question of law. They certainly are not brought before the Court with that accuracy which they would have been in case of a special verdict, but they resemble that state of things. Now I hope and trust I shall state the facts fairly to both parties, as far as I can extract them from the act on petition and the affidavits produced in the case. The averment on behalf of her Majesty's ship the *Melampus* is to the following effect:—That the collision took place in broad daylight, and "was not occasioned by any default or misconduct of those on board the *Melampus*, which vessel had been properly moored, but was entirely owing to the misconduct, bad management or want of skill of those on board the *Ticonderoga*." Now, generally speaking, that averment would be perfectly satisfactory, because in cases of one vessel coming into collision with another, and the vessel proceeded against having been in charge of a steamer, there can be no doubt whatever that the vessel which has the steamer in her employ is responsible both for her own acts and those of the steamer. The answer to that is, that the collision is not to be imputed to any one in charge or on board of the *Ticonderoga*; but there is no denial that it was due to those on board the steamer which was towing her, and then come the reasons why the *Ticonderoga* should not be held responsible, as in ordinary cases, for damage done, according to her own statement, by the default of the steamer engaged in her service. I take the true meaning of the plea to be, that the *Ticonderoga* was in the service of the French government; that the steamer was attached to her; and she was compelled, by the order of the government, to employ

Statement on
behalf of the
Melampus.

The collision
was not caused
by the miscon-
duct of those
on board the
Ticonderoga;
but of those on
board the
steamer which
was towed by
her.

Both vessels
were chartered
to the French
government,

her in all the proper duties which could attach to a steamer. I am not bound to go more minutely into what was the relation between the Ticonderoga and the steamer, for I have no sufficient information on the subject. I take it the steamer was to give all the aid and assistance in her power to the Ticonderoga. For instance, I conceive the steamer was bound to obey the Ticonderoga in towing her from one place to another, but that the steamer had the whole charge of the Ticonderoga is contrary to all common sense. The second article of the charter-party is, that the Ticonderoga shall be placed under the direction of the charterers, and be employed for a certain time. I apprehend the effect of this is, that she was to all intents and purposes under the direction of the French government, and of course the master of the Ticonderoga was bound to employ the steamer in question, and to pursue such course as the French government thought most convenient. The blame having been imputed to the steamer, let us consider whether the Ticonderoga can or cannot be made responsible for the damage which has been done. Now, that the steamer was engaged in the service of the Ticonderoga, and that the steamer took the Ticonderoga into mischief, there can be no doubt whatsoever. We must recollect that this is a proceeding *in rem*. I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this Court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage, and was proceeded against in this Court;—I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point;—but still I should here say to the parties who had received the damage, that they had, by the maritime law of nations, a remedy against the ship itself. Let us see what cases there are in which the Court does not hold a vessel responsible for the damage done. There is one case, and one only, that I am aware of, and that is, where a pilot is taken on board by compulsion. On what principle is the owner, in that case, relieved from paying the damage done? On the principle of compulsion—the principle that the man is not the servant of the owner, but is forced upon him by Act of Parliament. Was this steamer taken by compul-

s.

Q

1857.

March 6.

and the Ticonderoga was bound to put herself in tow of the steamer if required. Does that relieve her owners from responsibility for damage done?

By the maritime law there is a right of proceeding *in rem* against the vessel doing the damage, which cannot be taken away by any voluntary contract of the owners with a third party.

Compulsory pilotage alone a ground of exemption.

1857.

March 6.

The stipulations with the French government not a compulsory, but a voluntary act.

sion, or was it not? What species of compulsion is it which is averred on behalf of this American vessel that is to relieve her from the responsibility which the maritime law of the world attaches to the wrongdoer?—Entering into a stipulation with the French government. It is impossible to contend that because a person has entered into a voluntary contract by which he is finally led into mischief, that that can relieve him from making good the damage which he has done. I must pronounce against the *Ticonderoga*, and of course with costs.

Townsend, proctor for her Majesty's ship *Melampus*.

F. Clarkson for the *Ticonderoga*.

THE HARRIETT, T. INGRAM, *Master*.

Salvage—Appeal from Award of Justices.

The salvors brought the barge *Harriett* off a dangerous position near the Nore Sand, and claimed 80*l*. The magistrates at Maidstone awarded 15*l*. The Court held, on appeal, that the latter sum was quite inadequate, and gave 40*l*.

THIS was an appeal from a decision of the magistrates at Maidstone in a cause of salvage. On the 9th of December last the barge *Harriett*, timber laden, was, as alleged on the one hand, but denied on the other, in a state of great danger, in consequence of a storm, near the Nore Sand. The smack *Leader* went to her aid, and conducted her to a place of safety. The salvors claimed 80*l*., but the magistrates allowed 15*l*. only, from which award the salvors appealed.

Addams was heard for the Appellants.

Bayford for the Respondents.

Judgment.

DR. LUSHINGTON:—I entirely concur in the observation of the learned counsel who spoke last, that it was the object of the Merchant Shipping Act to prevent cases of small amount coming before the Court of Admiralty, and to curtail, as far as possible, the expenses incurred where the amount of salvage is small; but, at the same time, the act has provided that if the award of the magistrates shall appear to either of the parties unjust, there

shall be a remedy by an appeal to this Court, and the Court is bound to entertain it. I have always, to the utmost of my power, done my best to discourage small suits for salvage in this Court. We are well aware that the expenses are so large, that the advantage obtained is not commensurate with the expense of the proceeding. I quite agree with the observation, that unless there has been a gross miscarriage, it is part of the duty of the Court to discourage such appeals; but if there has been a gross miscarriage, then the case assumes a different appearance, because, if there was no remedy in that case, the consequences would be extremely mischievous. If the reward given to small vessels was not sufficient to compensate them for their services it would tend to discourage all those who labour to save cargoes on the coasts of this kingdom. With respect to the merits of this case, I think the magistrates have grossly miscarried. I think 15*l.* totally inadequate for the services rendered. It is not denied, in the course of the proceedings, that at the period when the services were rendered, the barge required assistance. It was blowing hard; she was lying on the Nore Sand. "She had her foresail set as well as they could set it, but not properly. Her mizen and her jib were blown away, her mainsail was brailed up as close as they could get it." Then the assistance is rendered, and the next day she is towed to Sheerness and brought there in safety. If these services had been unnecessary, or the parties were indisposed to receive them, they could have refused them. It was in their power to prevent the smack being fastened to the barge; the rope could have been cast off when it was attempted to be fastened, or cut if it was fastened. But they do no such thing; on the contrary, they accept the services so rendered. The mate says:—"The boat shot by us, and tacked and came up again, and he threw the rope on board, and I made it fast. I did not ask him to do so, or want him to do so." It is impossible for anyone to believe an averment of that kind, that he did not want a rope when he made it fast. It is clear to my mind he was in distress. Look at another part:—"I told the captain I had made the rope fast. I know there is a wreck on the coast. We were to windward of the wreck. I was under the captain's directions, and if he had told me to throw off the rope I should have done so; but I had no orders from him on either occasion. I consider myself qualified to give an opinion whether there was danger or not." So both the master and the mate are of one and the same opinion, that it was necessary for the safety of the vessel they should accept the services. Looking at the season of the year—the 9th of December—looking at the state of the weather, I can-

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March 6.

The Court will discourage suits for small amounts.

But must interfere where the magistrates have taken a totally inadequate view of the services.

1857. not but think that there has been gross miscarriage on the part
 March 6. of the magistrates, and I shall give the sum of 40*l.*, with costs.

Rothery, proctor for the salvors.

Jennings for the Harriett.

THE LA PLATA.

*Collision—both Ships being towed—Starboard Side of Fairway
 —17 & 18 Vict. c. 104, Sect. 297.*

The *La Plata*, a screw-steamer, 150 feet long, was in tow of a steam-tug going down the river, and keeping to the south shore in compliance with the statute. The *Hélène*, a brig of 190 tons, was being towed up the river, but did not keep to the north side, owing, as she alleged, to the state of the wind and tide. A collision ensued, the stem of the *La Plata* striking the port midships of the *Hélène*. Held, that the *La Plata* was solely to blame for the collision.

Semble—The 297th section of the Merchant Shipping Act is not to be taken to apply so strictly where vessels are in tow, as where they are sailing or steaming by themselves. A vessel navigating so as to impose unusual risk on other vessels will be held responsible for accidents arising therefrom.

April 3.

THIS was a suit promoted by the *Hélène*, a brig of 190 tons, against the *La Plata*, a screw steam-ship of 428 tons, for loss arising from a collision between them off Blackwall Point, in the River Thames, on the 10th day of October, 1856. It was alleged on the part of the *Hélène*, that at about 10·15 of the morning in question, she was proceeding up the river in tow of the steam-tug *Kent*, and in charge of a duly licensed pilot, both ships being a very little to the starboard side of mid-channel “to prevent the tide setting them into the dangerous bight of Blackwall,” when immediately on rounding Blackwall Point, they perceived the *La Plata* coming down the river in tow of the steam-tug *William Gunston*; that the helms of the *Hélène* and *Kent* were immediately ported and then put hard a-port; and that the helm of the *William Gunston* was also ported, though not in time; but that the helm of the *La Plata* was not ported at all, and she came stem on into the *Hélène*, striking her on the port side, and doing her such considerable damage, that she was obliged to be towed on shore to prevent her sinking in deep water. On the part of the *La Plata* it was alleged that she was proceeding down the river from Deptford to the Victoria Docks in tow of the steam-tug *William Gunston*, keeping well on the south shore or to the starboard side of mid-channel, and that on rounding Blackwall

Point, several vessels passed her on the port side; that shortly after they observed the *Hélène* coming up in tow of the steam-tug *Kent*, both vessels hugging the south shore. That they hailed the *Hélène* and her tug to port their helms, and that the helms of the *La Plata* and *William Gunston* were immediately put hard a-port; that after they had been hailed three or four times, the *Kent* ported her helm, and that in a few seconds afterwards the *Hélène* ported hers, and that the brig's midships soon afterwards came into collision with the *La Plata*'s stem. The *La Plata* attributed the collision to the *Hélène* and her tug having been to the south instead of the north of mid-channel, and to their not having ported their helms in time.

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April 3.

The Court was assisted by Captains *Farrer* and *Close*.

Addams and *Twiss* for the brig.

Robinson and *Jenner* for the *La Plata*.

DR. LUSHINGTON, addressing the Elder Brethren, said :— Judgment.
Gentlemen, it is our duty to endeavour to ascertain what is the true state of the facts in this case; and then to consider what are the legal results, as they affect either party. I wish in the first instance to call your attention to the manner in which the collision is admitted to have taken place, and then to some of the results, as matters of fact, that appear to me to arise therefrom. It is pleaded on behalf of the *Hélène* that the "*La Plata* ran stem on into the *Hélène*, and struck that vessel just before the main rigging on her port side." The statement on the other side, though varying in the mode of expression, is exactly the same in effect, "the *Hélène*'s midships, just before the main rigging, came in contact with the stem of the *La Plata*." Now Mode of collision.
it appears to me that in order for the collision to have taken place in this way, that the head of the *Hélène* must have been Head of the *Hélène* to the northward and westward.
somewhat to the northward, (I do not pretend to say how much to the northward, because the witnesses vary, some say to the west-north-west, and others much more to the north), and that the head of the *La Plata* was either direct east or to the north of east. If this was so previous to the collision, the *Hélène* had at least in some degree obeyed her port helm, and it also appears to me that the *La Plata*'s head, whatever might have been done to the helm, however much it might have been ported, could not have been brought round. I observe it to be alleged, though I do not know to what time that averment particularly refers, that the course of the *La Plata* was north by east to north-east, that Head of the *La Plata* to the northward and eastward.

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Act of Parliament
starboard
side of mid-
channel.

Some allow-
ance must be
made for
vessels being
towed.

Case of the
Hélène.

Case of the *La*
Plata.

is so stated in the preliminary act; but I rather think, to reconcile the statement at all, the course must have been north by east at some period antecedent to the collision. The next question will be what were the proper courses of these vessels, and I must now direct your attention to the Act of Parliament which has been already cited by one of the learned counsel in the case. By that Act of Parliament it is stated that "every steam-ship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship." The consequence would be, that it would be the duty of the *Hélène* to keep to the north of mid-channel, and of the *La Plata* to the south. But, gentlemen, this rule must be modified with respect to both vessels, because I am clearly of opinion, however strictly you may apply the rule to two steamers navigating alone, the one going down on the south side, and the other coming up on the north, yet in the case of a vessel in tow of another, some allowance must be made, and some deductions taken from that extreme strictness which applies to a vessel steaming by itself. Some allowance must also be made for the state of the tide, the peculiarity of the locality, and especially if there was any wind. Now I will first direct your attention to the case of the *Hélène*, because, unless her hands are free from blame, she cannot recover in the present action. She would be to blame if the collision was occasioned either by her being too far to the southward of mid-channel in disregard of the statute, or if she neglected to port her helm in time. She would not be to blame simply if she was a little to the southward of mid-channel, if the peculiarity of the locality and the state of the tide accounted for it, because the provision of the act is, "whenever it is safe and practicable" so to do. That must be construed with reasonable latitude. With regard to the porting of the helm, which is said to have been done too late, that is a question on which the evidence is very conflicting. It is clear her head was turned in time, but whether she was as far to the northward as she ought to have been is a question on which I wish your advice, upon a consideration of the whole case. If the collision has been occasioned by the failure of the *Hélène* in either of these particulars, she cannot recover, whatever may be the fault of the *La Plata*; but to work this effect there must be not only a failure in these respects, but no circumstances to make a departure from the rule necessary. A subsequent section, which you have heard so often, substantially enacts what I have stated. With reference to the *La Plata*, she is a screw-steamer of 428 tons, and 150 feet long, and was proceeding in tow of a steam-tug from Deptford to the

Victoria Docks below Blackwall. It is clear also that she started before high water, and whilst the flood was making. Whether that was right or wrong I must leave entirely to you; but I must observe that I know of no law which prohibits its being done, and probably the exigency of navigation would not admit of any positive rule. I think it is also clear that if the so being towed by a steamer against the tide is productive of risk or danger to other vessels more than usual and ordinary, and if damage arises therefrom in consequence of this risk or danger, the owners must be responsible for that damage. The next consideration is as to the state of the tide and the consequences arising therefrom in that locality. I think that the evidence, though conflicting, leads to the conclusion that though high water may have passed, the flood tide may still have had some effect. I do not venture, of course, to form an opinion as to the extent of that effect. Then the question as to the La Plata is, whether the collision arose from any fault or default on her part, and in these particulars, viz., did the La Plata, on seeing the *Hélène*, port her helm, and did she answer her port helm? I quite agree with Dr. Addams, that when it is pleaded that the ship ported her helm, it is not sufficient that the helm was put to port, but the ship must answer it also. Then the question will be, not merely whether she ported in due time, but whether she answered her helm in time, and if she did not answer her helm, what was the cause? The evidence in my judgment clearly goes to show that the helm of the La Plata was ported in due time, for she had ported to pass the *Rose*, and kept the helm to port. I think the head of the La Plata was not altered to southward of east, but, according to the evidence, her head was either to the east or the north of east. I think this is proved, first from the mode of collision, and, secondly, it is proved by all the evidence in the case that her head was not moved. Whether or not her head was moved in any degree sideways to the southward I cannot tell. If the La Plata did not answer her helm, and the consequence of her not so doing contributed to the collision, what was the cause? Was it from the length of the La Plata, was it from the length of the tow rope, was it from her having gone too near to the south shore, regarding the Act of Parliament, but following it up too closely, or was it that the eddy of the tide affected her? If it was either of these causes I hold her to blame; for if she was so navigated as to expose other ships to unusual danger, she must be responsible for their not getting out of the way, which, under other circumstances, they might have done.

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A vessel navigating so as to impose unusual risk on other vessels will be responsible if an accident ensues.

Evidence shows that the La Plata ported her helm, did she answer it?

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April 3.

The Court and the Elder Brethren having retired for consultation, on their return

DR. LUSHINGTON said :—The gentlemen by whom I have been assisted are of opinion that the *La Plata* was to blame for this collision.

F. Clarkson, proctor for the *Hélène*.

Toller for the *La Plata*.

THE *MARY PLEASANTS*, D. LYONS, *Master*.

Salvage—Ship—Cargo.

H. M. steam-ship *Leopard* rendered a salvage service to an English vessel then in the service of the French government and laden with a valuable cargo. The suit was entered against the vessel alone, her value being 4,247*l*. The Court, advertg to the difficulty of apportioning salvage where the cargo was not before it, awarded 600*l*. on the value of the vessel.

April 7.

THIS was a suit promoted by her Majesty's steam-ship *Leopard* against the *Mary Pleasants*, to procure salvage remuneration for services rendered to her on the 10th of November, 1855, and following days, about seven miles to the westward of Eupatoria. The *Mary Pleasants* was employed in the transport service of the French government, and had on board French troops, provisions, stores, &c. She was driven on shore by stress of weather. These services consisted in lightening the vessel and occasionally attempting to tow her off. The value of the ship, which alone was proceeded against, was 4,247*l*. On the part of the owners it was contended that the vessel was not towed off by the *Leopard*, but floated off, and that a small remuneration would be sufficient reward.

The *Queen's Advocate* and *Spinks* were heard for the *Leopard*.

Bayford and *Twiss* for the *Mary Pleasants*.

Judgment.

DR. LUSHINGTON :—I am of opinion that nothing passed between Captain Giffard and the master of this vessel which can estop the claim of Captain Giffard for salvage, as a reward for services which were performed to this ship; moreover, he is

authorized, as required by the Act of Parliament (a), by the Admiralty to make the claim. I must consider what his personal services were worth—when I say personal services I use that expression in order to distinguish it from other cases, inasmuch as it has been observed by Dr. Twiss, that no claim could be made on account of the assistance given by the vessel herself for any risk or damage which she had incurred (b). The services lasted during seven days, and the vessel undoubtedly was in a state of very considerable difficulty, because, whether she could ultimately have been saved without the assistance of a steamer is not the question, but the true question is, whether she did not require this assistance first to save the cargo and then the vessel herself. It might have been that by simply throwing overboard the cargo the vessel might have come off, and probably would in that way; but that does not detract from the merit of those who rendered the assistance in the present case. But the real difficulty is, that there is no proceeding against the cargo. The vessel is English, and was in the service of the French government. She was laden with a cargo consisting of articles which, from the statement of the master, must have been of very considerable value. The difficulty, I say, arises from this circumstance, because when the Court considers the services rendered to the ship and cargo, it always estimates the amount of salvage remuneration according to the value of the ship and cargo taken together. It is contrary to all principles of justice, if a cargo has received and been benefited by the services so rendered, that the whole burden of the salvage remuneration should fall on the ship itself. I know not, in this case, the value of the cargo, and consequently the Court is put in a situation of some difficulty in forming an estimate of the compensation which should be given. Looking at all the circumstances of this case, I am of opinion—not attempting to place any definite value upon the cargo—that I should not be justified in imposing on the ship a greater burden than 600*l.*, with costs.

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The assistance was necessary to the preservation of a valuable cargo.

Difficulty the Court feels when the cargo is not before it.

Burchett, proctor for the salvors.

Tebbs for the Mary Pleasants.

(a) 17 & 18 Vict. c. 104, s. 485.

(b) *Ib.* s. 484.

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April 7.THE JONGE ANDRIES, T. A. STEFFENS, *Master*.*Salvage—Agreement—Pilot.*

An agreement made with salvors is not to be lightly set aside, either on the ground that some fact of an immaterial character relating to the state of the vessel was unknown to or concealed from the salvors, or because the weather subsequently became tempestuous, which rendered the services more onerous than might have been contemplated by the salvors. The Court will not favour a claim for salvage by a party originally engaged as a pilot; at the same time pilots are not to be compensated by mere pilotage remuneration for a salvage service.

THIS was a cause of salvage promoted by the master, owners and crew of the fishing smack *Intrepid*, against the Dutch galliot *Jonge Andries*, for services rendered to her from the 13th to the 17th days of November, 1856. It appears that at about three or four o'clock p.m. of the 13th of November, the smack was about sixty miles from the land off Southwold, and was engaged on a fishing voyage for the London market, when her crew observed, at the distance of about four miles, a vessel with a flag flying at her foretop-gallant masthead, and immediately bore down upon her. She proved to be the galliot *Jonge Andries*, bound with a cargo of grain from Cronstadt to the river Maas; and as she had recently met with very severe weather, her master was desirous of getting into a port of safety. Ultimately an agreement for fifty pounds was drawn up in the Dutch language, of which the following is a translation:—"The undersigned, Captain T. A. Steffens, of the ship *De Jonge Andries*, acknowledges to have engaged as pilot and to sail ahead Captain Syduiwai, for the price of fifty—say fifty pounds. At sea, 13th November, 1856." This agreement was signed by the master of the galliot, and by Sydney Halsey, the master of the fishing smack. The vessel then stood in for the land, the smack accompanying her, but the weather became so violent and the sea was so rough, that little way was made, and at length, after having altered the course of the vessel several times, the smack, at the request of the master of the *Jonge Andries* at about seven o'clock a.m. of the 16th took the vessel in tow, and at about 10 a.m. of the 17th she was finally moored in safety in Lowestoft harbour. The salvors alleged, first, that when the agreement was entered into, they were ignorant of the state in which the galliot was, and that certain damages which she had sustained, to her bowsprit particularly, had been concealed from them by the master; that, moreover, they had performed

services not included in the agreement; that the agreement was to pilot only, and did not include towage services; and that "had it not been for the incessant exertions of the said Sydney Halsey at the pumps and otherwise as aforesaid, and the assistance rendered by the smack, the said galliot would never have reached the land." The owners alleged that the agreement was intended to cover all the services rendered, as well by Sydney Halsey as by the smack. A tender of 50*l.* was made, which was refused by the salvors. The value of the property salvaged was 2,270*l.*

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Jenner and Deane for the salvors.

Addams and Spinks for the owners.

DR. LUSHINGTON:—This is an action for salvage, brought by the master and crew of a small fishing smack, called the *Intrepid*, on account of certain services said to have been rendered to a Dutch galliot, which services commenced whilst that galliot was about fifty miles from the Dutch coast. This action is met on the part of the owners, by making a tender to the amount of fifty pounds; and they make that tender, it is averred, on the ground that an agreement had been entered into, and had been put in writing, whereby it was stipulated that certain services were to be performed, and that the master and crew of the smack should receive the sum of fifty pounds and no more. The answer on the part of the salvors is, that the agreement was entered into when the salvors were in a state of improper ignorance as to the real condition of the vessel herself, and that they were deceived by the master of the galliot keeping back certain injuries she had received: therefore the original agreement was void, and if it was not void originally, it was void afterwards, by reason of services having been performed which were not included in the agreement. The first consideration for the Court is, whether there was any such concealment prior to entering into the agreement as would justify the parties who signed that agreement in saying, "we laboured under deception practised upon us." That deception is said to have consisted of two things:—first, that the bowsprit had been sprung, and, secondly, as to the quantity of water made. I am clearly of opinion that neither of these circumstances can vitiate the agreement. It was not for the master, when he entered into the agreement, to point out every circumstance that had occurred during the voyage. If there had been any circumstances of importance purposely concealed, it might have been different, but it is clear that the

Was there any wilful concealment of the state of the ship from the salvors?

No material concealment.

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What then are
the terms of
the agree-
ment?

bowsprit injury was slight, for the vessel sailed away to Lowestoft without repair at all. With regard to the vessel making water, why almost every vessel coming from the port of Cronstadt does make some water, and in this case there were only six quarters of rye damaged. I am of opinion that there is no pretence for saying that the parties were deceived, and that the agreement is void on that account. Then if it be not void, what are the contents of the agreement, and what is the true mode of construing those contents? I cannot listen to a great deal which has been addressed to the Court about conversations here and there with respect to the agreement. I must look to the agreement itself; and I must presume that the parties understood it, and consequently are bound by it. I am not at liberty to look at anything beyond the agreement, except the surrounding circumstances; because, if there be a doubt as to the original words, I look to the facts, that I may better understand the agreement. But I cannot look to conversations nor the understanding of the parties on the one side and the other; I must assume that they put their joint views into the agreement when they signed it. Now it is said on the one hand that the true meaning of the agreement is, that the fishing vessel was engaged for a pilotage service, that she was to sail ahead; on the other hand, it is alleged all the services that could be rendered by the master and by the smack were engaged for.—The agreement is in these words:—"The undersigned, Captain T. A. Steffens, of the ship *De Jonge Andries*, acknowledges to have engaged as pilot and to sail ahead Captain Syduiwai, for the price of fifty—say fifty pounds." With regard to the meaning of these words, if the Court were to stop at the first part of the sentence, and to construe it literally, without reference to the circumstances, "acknowledges to have engaged as pilot" would have the meaning that it was intended to take the services of this man as pilot only. But there is another important matter which immediately follows—"to sail ahead." What is "to sail ahead?" Dr. Jenner very ingeniously said, this is exactly the same as the Pilot Act, where it is said the pilot has to be paid though he never boarded the vessel. That is very true, but the two cases are totally distinct. If a pilot is unable to board a vessel, but goes ahead in his cutter and performs his part, he is entitled to be paid; but in this case the master of the smack was enabled to go on board. If he had left the Dutch galliot and continued on board his vessel, and then said, "I will pilot you to a port of safety, you follow me," then the case would have come within the true meaning of pilotage. As it stands at present, it appears to be open to a very different construction, and I am bound to say

What is the
meaning in it
of "to sail
ahead."

the services of this vessel were engaged for some services not properly included in pilotage. Having thus stated my *prima facie* impression as to the agreement, let us see what there is in the admitted facts and circumstances of the case which the Court ought to take into consideration. I do not consider the vessel to have been in distress at all. Having met with bad weather she was exceedingly anxious, if she could, to get a pilot to conduct her to the Dutch coast, but failing in that, and making a certain degree of water, the master was desirous of being brought to a place of safety till he might have an opportunity of prosecuting his voyage. As was stated by Dr. Addams, the agreement was to convert uncertainty into certainty. We all know that when a ship is at sea, and requires assistance to bring her into port, there is uncertainty as to duration, the degree of labour, the degree of fatigue which may be incurred in performing the service, and the master of the vessel to whom the service is rendered is necessarily anxious that his owner should not be liable to unlimited responsibility. I now come to the next point of the case. It happens as a matter of fact, though as it appears to me it does not matter, one way or the other, that the vessel met with tempestuous weather, and she was considerably detained in the prosecution of her voyage to an English port. They seem to have been undetermined as to the port to which they should go. Sometimes she was to go to Ramsgate, at other times she was to go to a port in the neighbourhood of the Norfolk coast. Now what was done by the master of the fishing vessel which was to change the nature of the agreement? He says, in effect, "I assisted in pumping; the weather became tempestuous; there was considerable labour employed in keeping the vessel free. I worked myself, and by this means I converted this, which was a pilotage, into a salvage service." Now I am of opinion that a more dangerous doctrine than this could not be imported into this Court. The Court has always held, with regard to pilots, that they are entitled to say, when they get on board vessels which are not seaworthy, and therefore in a state of danger,—“We do not come in the character of pilots only, but also in the character of salvors.” In such a case they are not entitled to abandon the vessels, but the Court has uniformly given them an additional reward, thinking they are not to be compensated for a salvage service by mere pilotage reward. But if you engage a pilot, and he lends a hand, in consequence of the necessity of the case, arising from the winds becoming more boisterous than they were before, and everything which is not strictly pilotage is to be construed into salvage, masters should be exceedingly cautious how they allow a pilot to touch

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Vessel not in distress, only wanted a pilot.

Did the subsequent tempestuous state of the weather set aside the written agreement.

The Court will discourage the attempt to convert pilotage into salvage services.

1857.

April 7.

Agreement
pronounced for.

a single rope, or to do any more than give directions. The remaining question is that which relates to towing. I am of opinion that the construction of the agreement is, that the services of this smack should be given; and that being so, I am of opinion that the claim for salvage is barred by the agreement, and I shall pronounce for the tender with costs.

Jenner, proctor for the salvors.

Deacon for the *Jonge Andries*.

THE PERLA, ANDICORCHEA, *Master*.

Salvage—Derelict—Misconduct of Salvors.

A derelict ship was fallen in with by the G. steamer, and towed to Bridlington Bay, but received considerable damage by taking the ground as she was going into the harbour:—Held, that the salvors were wrong in attempting to carry a vessel of such size into the harbour, and that something must be deducted on that score from the salvage they would otherwise have received.

THE steam-ship *Gitana*, while on a voyage from Hartlepool to Hamburg, fell in with a large barque, the *Perla*, at one o'clock p.m. on the 29th of September, 1856, with a signal of distress flying. On nearing her it was found that she was derelict; the steamer took her in tow, and after two days' severe labour conducted her in safety to Bridlington Bay. Afterwards, in taking the vessel into the harbour, she took the ground, and sustained considerable damage. Two suits were instituted against the *Perla*, one by the owners and crew of the steamer, the other by Captain Hans Pieper, a master mariner, and four foreign seamen, passengers on board the steamer. The value of the property salvaged exceeded 15,000*l*.

The *Queen's Advocate* (Sir J. D. Harding) and *Deane* were heard for the steamer.

Bayford and *Waddilove* for the foreigners.

Addams and *Wambey* for the owners.

Judgment.

DR. LUSHINGTON:—This is a case of derelict, and is so admitted to be on all hands. The *Perla* had been abandoned by her crew, and was found in the North Sea without any one on

board. That constitutes in law a derelict; and such this vessel was in every sense of the word, for it appears impossible to imagine a ship in greater distress. As to any chance of her being picked up by another vessel and brought into a port of safety, that is a matter which the Court never takes into consideration. It applies the principles always applied in derelict cases. The services were performed by a ship of considerable value, for the *Gitana* is stated to be worth 16,000*l.*, and to have had on board a cargo of the value of 30,000*l.* She had also a considerable number of passengers, and was proceeding from Hartlepool to Hamburg, when she fell in with this derelict and brought her to Bridlington. If the case had rested there, it would have been the simplest of all cases, and the Court would have had nothing to do but to apportion the sum due to the parties entitled to it. But, unfortunately, there is considerable contradiction with regard to other circumstances I am about to mention. It appears that the vessel was brought to Bridlington Roads, and then very properly into Bridlington Bay; but here arises another question—ought she to have been carried into Bridlington Harbour? If she ought, were the proper measures adopted, or were there any others which might have been pursued by the *Gitana*? The case of the owners of the *Perla* is that she ought not to have been carried into Bridlington Harbour. The agents of the owners swear that she ought not to have been taken into the harbour, and they say that they issued positive orders to the contrary. The case set up by the *Gitana* is, that Mr. Spence the master yielded to the orders of Lieutenant Chatlock, and that that was his justification for going into the harbour. Now, what turns out to be the fact? Lieutenant Chatlock and the receiver of droits depose, beyond all doubt whatever, that they never took upon themselves to give the order sanctioning this proceeding. Unfortunately the matter does not end there, or it would be of little importance. The vessel gets aground, and very considerable mischief occurs in consequence thereof. I must say I am satisfied upon the whole that a great deal of blame does attach to Mr. Spence for taking the vessel into the harbour. The result was that considerable damage is done to the vessel, and I am bound to take that into consideration. It is utterly impossible to estimate, from this evidence, the precise amount of damage which has occurred to the ship and cargo, and all I can do is to deduct a specific sum from that amount which I should otherwise have given. I should observe here that, in a case of this description, it is not the practice to impose on the salvor the whole burden of the loss, but only a part of it, in proportion to the degree of

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April 7.

A case of derelict.

Salving vessel of great value.

But the vessel was improperly carried into the harbour and damaged thereby.

A deduction must therefore be made from the salvage.

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*April 7.*Apportion-
ment of the
salvage.To the owners,
1,500*l.*To the master,
500*l.*To the crew,
800*l.*As to costs of
second action.

blame which attaches to him. Taking all the circumstances into consideration, and taking the value at 15,200*l.*, and having been asked to apportion the salvage, I shall give a very considerable proportion of the reward to the owners of the *Gitana*. I do so for this reason: in the first place, their property is very valuable, and they had charge of a valuable cargo; and, secondly, the vessel itself was the principal salvor. It is not here, as in many cases, that the labour falls on individuals. Taking this into consideration, and also any expenses to which the owners may have been put, I shall give them the sum of 1,500*l.* With regard to the master, I think he properly comes next, because it was upon his responsibility that the act was done, and it requires some degree of courage, when a captain is entrusted with a valuable ship and cargo, to depart from his original destination, and undertake the charge of bringing a vessel to port. I shall give him the sum of 500*l.* As regards the crew, the additional duty which fell to their lot was extremely light. I shall give them 800*l.*, to be distributed according to their rate of wages. I must now dispose of the case of these foreign seamen, and I decree that they shall share the same as able-bodied seamen, with the exception of the foreign master, who shall take a double share. I have only one remark more to make, and that is as to the costs of the suit brought on behalf of these seamen. I should be very much indisposed to give the costs of the second action, because I think their services cannot be distinguished from that of the others. There is, however, one reason why I shall give them their costs—they were the persons who first brought their suit.

The REGISTRAR:—The foreign seamen and master will take their shares in addition to the 800*l.*?

The COURT:—Yes.

Felder, proctor for the steamer.

Waddilove for the foreign seamen.

Rothery for the *Perla*.

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April 8.THE SYLPH, O. E. SMITH, *Master.**Collision—Foreign Ship—Coloured Lights.*

The galliot A. running up Channel sees the green light of steamer S. three or four points on her starboard bow, and starboards her helm; then she sees the red light appear and ports. A collision ensues; the stem of the S. coming in contact with the A.'s port midships:—

Held, that the A. was justified in starboarding when she saw the green light, and afterwards in porting when she saw the red light appear, and that the mode of the collision showed that the S. either starboarded her helm, or ported too late, or did not port at all.

THIS was a suit promoted by the Dutch galliot *Ardina*, of the burthen of 107 tons, against the steam-ship *Sylph*, of the burthen of 255 tons, with two engines together of 70-horse power, to obtain compensation for a total loss occasioned by a collision between them at four a.m. on the 20th of November, 1856, a few miles from Beachy Head. The galliot, with a valuable cargo of figs, wine, &c. was bound from Lisbon to Vlaardingen; the steamer was proceeding from London to Dublin, with a general cargo and passengers. According to the statement of the galliot the morning was moonlight but cloudy, and she had a light suspended under the bowsprit cap; she was steering an E. by S. course up-Channel, when a green light was discovered between three and four points on the galliot's starboard-bow, distant about a mile and a half. The galliot, as a matter of precaution, put her helm to starboard, for the purpose of giving the steamer a wider berth. When the galliot had luffed to about N. E. the green light disappeared, and the red light came into view, distant about half a mile; the galliot thereupon ported her helm and paid off considerably, but the steamer ran stem on into her port midships, in consequence of which she instantly went down. The mate, the cook and a boy were drowned, but the remainder of the crew escaped on board the steamer. The steamer alleged that the galliot was seen about one point on the steamer's port-bow, distant half a mile, which was the greatest distance at which she could be seen in the then state of the atmosphere, having no light visible on board her; that the helm was immediately put hard aport, and the steamer came up, but that the galliot, instead of keeping her course or porting her helm, improperly starboarded it, and, when too late to avoid the collision, suddenly ported it, and thus brought the steamer in

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contact with her, notwithstanding her engines had been stopped and were ordered to be reversed.

Judgment.

DR. LUSHINGTON, addressing the Elder Brethren, said:— This is a case of considerable importance in point of value, and it has also been attended with very melancholy consequences, namely, the loss of three lives; but however much we may regret that circumstance, it cannot be supposed for an instant that it will affect our judgment in coming to a conclusion upon the evidence before us. The case is not only of importance in point of value, but it is also most contradictory in the evidence, the most essential statements on both sides being directly at variance the one with the other. What I propose to do, for I shall not detain you at any length, is, first to call your attention to the statements set forth in the preliminary acts, and I do it for this reason, because all parties are bound by the statements contained in those preliminary acts, so far as the matters and things therein contained are within their own knowledge. With regard to other circumstances which can only be stated from conjecture or inference, great allowance must be made, and I will also observe, and the observation applies to both parties, that in all these cases witnesses will vary very materially in their statements of facts according to their recollection; and not only will the witnesses contradict each other on the one side and on the other, but witnesses examined on the same side will vary greatly as to the extent to which the ship went off on her port helm, and matters of that description. All this will happen, but we must endeavour to take the fair import of the evidence on both sides, making due allowance for want of memory. When the vessels are foreign, as a general rule, they are in no degree bound by any acts of parliament whatever, nor by any orders issued by the Admiralty. Now there are several circumstances in which all parties agree, and which I need not repeat, such as the locality where the collision took place, and the direction of the wind. There is some little difference as to the state of the weather, but it does not appear to me, looking at the facts, to be of much importance; on the one side it is stated to have been moonlight, and on the other dark. The courses of the vessels have been already stated to you, and I need not repeat them; but there is one very important fact on which the parties are agreed, which has weighed very greatly on my mind in the consideration of this case, and to which I wish particularly to direct your attention—that is, the mode in which the collision took place. The statement in the preliminary act on behalf of the *Ardina* is, “The stem of the *Sylph*,” “Port midships of the

Preliminary
act.

Admitted facts
of the case.

Mode of the
collision.

Ardina." The Sylph's statement is, "The Sylph's stem came in contact with the Ardina's port midships." Now I shall very briefly state to you the galliot's case, and ask you whether you believe the evidence given on her behalf, as with reference to the evidence given on behalf of the steamer. Her account is, that she first saw the green light of the steamer between three and four points on her starboard bow, and that on that account she starboarded her helm. Now the first point is, was this right or wrong? Assuming that the green light was seen two or three points on the starboard bow, I cannot conceive for what purpose the green light is put on the starboard side of a steamer, and the red light on the port side, unless it is to be some guide to vessels at a distance, that they may govern themselves by taking those measures best calculated to avoid collision. When you see the green light of a steamer, it is manifest that her starboard side is towards you; if the red light is visible it is the reverse; and if you were then to starboard your helm, you would throw yourself right across the hawse of the steamer, and run great risk of collision. So much for that point. Then she says that having starboarded her helm, she afterwards saw the red light of the steamer. If her account be true, the helm of the steamer must have been altered, as she saw the red light. Then she says she immediately ported her helm and brought her head round many points—how many, I cannot pretend to say. Then she concludes by saying that the steamer starboarded her helm, ran into her, and occasioned the collision which was followed up by the immediate loss of the galliot. Now, that is her case. You will have to consider, gentlemen, whether or not this is a probable statement. On the one side it is said to have been an impossible case; but you will have to consider whether it was a probable case, as with reference to the evidence of the witnesses who have been examined; and also bearing in mind the contradictory evidence which has been given. So much for the case of the galliot. Now the case of the steamer may be told in a few words. She says she saw the galliot one point on her port bow half-a-mile off, and that she immediately ported, and kept her helm to port. She says her head was altered from what it was before—W.N.W. to N. and by W., or thereabouts, and that her engines were reversed at the time, or about the time, and that she adopted all the measures she could in order to avoid the collision, which was occasioned by the galliot first starboarding, and then porting her helm. Now I must put it to you whether it is possible that, if the steamer saw the galliot at the distance of half-a-mile and immediately ported her helm,

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Ardina.Sees the green
light three or
four points on
her starboard
bow, and star-
boards her
helm.Sees the red
light appear,
and then ports
her helm.Case of the
Sylph.

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and kept it to port, (whatever was done by the galliot by starboarding her helm or otherwise,) the galliot could have been struck amidships on her port side? That is the question you must consider upon the whole of the evidence. There is only one other point which it is necessary to put to you, that is, whether the galliot carried a light, which light was not seen by the steamer. Now we shall have to determine by whose fault the collision took place, whether it was the fault of the steamer in starboarding her helm, or not porting in time; or whether it was the fault of the galliot in having starboarded her helm in the first instance, and then ported it afterwards.

Sylph's case
manifestly un-
true from mode
of collision.

DR. LUSHINGTON, after consultation with the Elder Brethren, said:—We are all of opinion that the case set up by the steamer is manifestly untrue; because, if she, the steamer, put her helm to port, when distant from the galliot half-a-mile, according to her own statement, it was impossible that the collision could have taken place by the stem of the steamer striking the *Ardina* on her port midships, though the *Ardina* did starboard and afterwards port her helm. That the *Ardina*, seeing the green light on her starboard bow, was justified in starboarding her helm, and afterwards in porting her helm when the red light was seen. That the collision on the port side amidships could only have taken place by the Sylph starboarding her helm, or porting it too late, or not porting at all (a).

Ardina justified in starboarding when she saw the green light, and afterwards porting when she saw the red.

Rothery, proctor for the *Ardina*.

F. Clarkson for the Sylph.

(a) From this decree an appeal was prosecuted to her Majesty in Council, and on the 30th of June following their Lordships affirmed the sentence

of the Court below with costs, and remitted the cause. The Lords present were the Lords Justices Knight Bruce and Turner, and Sir Edward Ryan.



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April 7.

THE ACTIF, T. K. THIESBE, *Master*.

Salvage—Salvor's Costs—17 & 18 Vict. c. 104, s. 460.

A salvage service commenced fifteen miles off the coast of the United Kingdom terminated in the Humber; action entered in 500*l.*, 100*l.* awarded. On the question of costs; held, that the limitation as to costs in 460th sect. of Merchant Shipping Act extends only to cases where the service is performed within the limits of the United Kingdom, *i. e.* within three miles of the coast; beyond that distance the Court will exercise its own discretion as to giving costs with reference to the sum awarded.

THIS was an action brought by the smack Britain against the Norwegian barque Actif, to obtain compensation for salvage services rendered to her in the North Sea on the 28th of September, 1856. On the 27th of February the Court awarded 100*l.*; but a question then arose whether, under these circumstances, the salvors, under the provisions of the Merchant Shipping Act, were entitled to their costs.

Bayford now contended, on behalf of the owners, that it was the intention of the Act of Parliament that in cases where the claims for salvage do not exceed 200*l.*, they should be decided by local magistrates, and not by this Court, provided the services were rendered within three miles of the shore. In the present instance the services commenced beyond that distance, but were not completed until the barque was brought into port. He submitted that the salvage awarded being only 100*l.*, the salvors were not entitled to their costs.

Jenner, on the part of the salvors, relied upon the authority of the case of the *Leda*, and argued that the services having originated upwards of three miles from the shore, they had a right to costs.

The Court reserved its decision.

DR. LUSHINGTON :—This foreign ship was found about fifteen miles distant from the coasts of Norfolk and Suffolk, and by the assistance of the salvors reached the Humber in safety. The Court was of opinion that 100*l.* was an adequate reward, the action having been entered at 500*l.* The question is, whether, under these circumstances, the Court ought to allow the salvors their costs. The determination of this question must be governed

May 4.
Judgment.

The question is as to costs, under 460th sect. of Merchant Shipping Act.

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May 4.

No circumstances to induce the Court to certify.

Case of the *Leda*.

In this case Court entitled to exercise jurisdiction.

by the Merchant Shipping Act. Prior to the passing of any statute on the subject, the costs would have been allowed as a matter of course, there not having been a tender. No doubt is raised as to the power of the Court to certify that the circumstances, though only 100*l.* has been decreed, justified the bringing the case before this Court, and for that reason to give costs; but I was and am of opinion that there were no facts of any peculiar kind which would authorize me to adopt this course. The sole question, therefore, is, the construction of the 460th section of the Merchant Shipping Act in connection with one of the other sections. In the case of the *Leda* (a), I expressed my opinion that, where the service was performed within three miles of the coast—which was the best exposition I could give to the expression of the statute “in the United Kingdom”—and the sum claimed for that salvage did not exceed 200*l.*, the case must be referred to the arbitration of two magistrates. In the present case the service was performed out of the United Kingdom, and the sum claimed is 500*l.* That the Court is entitled to exercise jurisdiction thereon cannot be doubted, but as the Court has found that 100*l.* only will be a fit compensation, then I have to consider whether the jurisdiction of the Court is left wholly unfettered as to costs, as it was independent of any statute, or whether the Act has imposed any and what restrictions. The admitted restriction as regards jurisdiction is, service within the United Kingdom, and claim under 200*l.* Now, supposing the service to be rendered within the United Kingdom, and the claim to exceed 200*l.*, then, according to the statute, such claim may, by the consent of the parties, be referred to the arbitration of the justices. If they do not consent it must be tried in the Admiralty Court, with this proviso, that if 200*l.* only be given, there shall not be costs unless the Court certifies. I apprehend that the reason of this enactment as to costs is clear. The object was to enforce the former part of this section. The legislature expressed its opinion that suits for salvage within the United Kingdom for sums not exceeding 200*l.* ought to be determined by the justices. To prevent the evasion of this enactment by the salvors claiming above 200*l.*, and so bringing the suit in the Admiralty Court, the Act provides that no costs shall be given except under the circumstances therein stated. The claimant is by the conclusion of this section enabled to apply to the justices, even though the other party may not join. These are the words:—
“And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salvaged, or of their respective agents.”

(a) Page 40, *supra*.

Whatever may be the effect of this part of the statute—whether the justices are compellable to hear, or the other party to attend, or whether the justices could proceed in the absence of parties—however that may be, I cannot entertain any doubt of the intention of the legislature, however expressed, to give the salvors, in every case of salvage, and especially in one so circumstanced, a remedy. Then, is this restriction as to costs intended to be confined to salvage performed within the United Kingdom, where the sum given does not exceed 200*l*.? or does it extend to all salvage cases wheresoever the service was performed, when the sum allotted does not exceed 200*l*.? Without travelling over the same ground as I trod in the case of the *Leda*, I will observe, that I think the words “in the United Kingdom” to be found at the head of these sections run through and govern the whole of them. I am of opinion that this restriction as to costs has no reference to any salvage not performed in the United Kingdom. Let me consider what would be the consequence of putting a different construction upon the words employed. Suppose I was to put this construction, that the words “in the United Kingdom” were intended to describe the locality of the dispute only, and not the locality of the service performed, I cannot do so without, as it appears to me, disregarding the provisions of the 458th section, which says, “Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom,” &c. I think that the dispute contemplated by the Act is a dispute as to salvage rendered in the United Kingdom. Upon consideration, therefore, of the 458th, 460th and 498th sections, I am of opinion that, in a case such as this, the Admiralty Court is not prohibited from giving costs according to its ordinary practice. This Court always has been and is most desirous of discouraging salvage suits for small amounts, and will follow that principle so far as the law will allow. I think it right to say, and I am bound to state, that there are very great difficulties in putting a construction on this part of the Act. It is exceedingly difficult to understand whether the legislature referred to the commencement or the completion of a salvage service. It is still more difficult to say to what cases the authority of the magistrates may extend. I do not think it necessary on the present occasion further to advert to these difficulties, though I am fully sensible of them. I shall reserve my opinion till the case arises, and in this case I shall give the costs.

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The words “in the United Kingdom” run through and govern all these sections of the Act.

And where the service is performed without the United Kingdom, the Court is left to its own discretion as to costs.

Obscurity of this part of the Statute.

Jenner, proctor for the salvors.

Coote for the Actif.

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May 4.

THE CHANGE, T. J. ROCHFORD, *Master*.

Bottomry Bond—Rate of Interest inadvertently omitted.

In a bottomry bond taken at Calcutta, blanks had been left where the rate of interest ought to have been expressed, the Court pronounced for the bond, with such interest as the Registrar should find to have been usual on such risks at the time and place the bond was taken.

THIS was a case of a bottomry bond given at Calcutta on the vessel the *Change*. When the ship arrived in this country it appeared that there were blanks in the instrument in those places where the rate of maritime interest ought to have been expressed. A notarial certificate or affidavit was given in from the notary who drew the instrument at Calcutta, stating that the blanks were omissions arising from carelessness on his part, and that 30 per cent. was the rate agreed upon. The Court was moved to order that rate of interest to be inserted in the bond.

Judgment.

DR. LUSHINGTON refused to make such an order, as it would be dangerous, however clear the intention might be in the present case, to add to a written instrument; but he pronounced for the bond with such rate of interest as money on such risk would command at that time at Calcutta, and referred that question to the Registrar and Merchants.

F. Clarkson, proctor for bondholder.

THE FIREFLY, GEORGE COWLE, *Master*.

Ship—Salvage—Vivâ Voce Agreement upheld.

Where an agreement for salvage services is clearly established, the Court will uphold it, unless wholly inequitable, and will not set it aside on the ground that it is a hard bargain.

May 13.

THIS was a cause of salvage promoted by the steam-tugs Pilot and Gipsey King, against the screw steam-collier Firefly. The latter vessel got upon the rocks just outside Sunderland Harbour, on a night in December last. Two pilots came off in a small boat in answer to her lights and ringing a

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bell. Her master bargained with them to send two steam-tugs from the harbour. They summoned the crew of the tugs Gently and Pilot. The Gipse King came out of her own accord. The Gently, followed by the Gipse King, came out first, with the two pilots, and the Pilot tug a short time after. They hauled the Firefly off the rocks by about 6 a.m., and towed her inside Shields Bar, seven miles north of Sunderland, by about 8 a.m., where she took the ground. One of the paddle-wheels of the Gently became disabled during the towing, and she returned to port. Actions were entered in 700*l.* each by the Pilot and Gipse King, which were subsequently consolidated. The master of the Firefly asserted a *vivâ voce* agreement with the tugs, to tow the Firefly off the rocks and up to Jarrow, by Shields, for 20*l.* each, before he would allow a rope to be taken on board; and made a tender of 20*l.* each to the Pilot and Gipse King. The Gently did not appear at all in the suit.

The Pilot and Gipse King denied any sort of agreement, or any negociation or talk about any, and refused the tender.

The case was argued by *Bayford* and *Deane* for the salvors, by *Addams* and *Swabey* for the Firefly.

On the evidence there appeared a clear balance of independent witnesses in support of the *vivâ voce* agreement.

DR. LUSHINGTON said:—In such cases the first question is, *Judgment* whether any agreement at all is proved; next, whether it is so far consistent with equity that the Court will uphold it. On looking at the affirmative evidence, as compared with the negative evidence brought forward by the salvors, it is impossible not to be satisfied that the agreement was in fact made; and, though it seems a hard bargain, it is not such as the Court would be justified in setting aside. I must pronounce for the agreement, and, as a tender was made and rejected, with costs.

Stokes, proctor for the salvors.

Deacon for the Firefly.

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June 3.

THE SAPPHO, EDWARD M'DONALD, *Master*.*Collision—Claim for Salvage by one of the Parties to the Collision—Pleadings—Costs.*

The Sappho and Salacia came into collision in the Black Sea—a suit for damage determined that the Sappho was to blame, the Salacia then brought a suit for salvage. The Court will not encourage such suits; and, considering on the one hand that the salvage service proved was of a very trifling nature, and greatly exaggerated in the statement of the salvors; on the other, that the owners by going into irrelevant matter had needlessly prolonged the proceedings, gave only 80*l.* as salvage, but gave the salvors their costs.

THIS was a suit promoted by the Salacia against the Sappho to obtain a salvage reward for services rendered to her in the Black Sea on the 11th September, 1855, and following days. The two vessels having been in collision with each other, the Court, aided by the Elder Brethren of the Trinity Corporation, came to the conclusion that the Sappho was solely to blame. The Salacia rendered her aid to the Sappho to keep her from sinking, and finally assisted her into a place of safety.

The *Queen's Advocate* (Sir J. D. Harding) and *Deane* appeared for the salvors.

Bayford and *Spinks* for the owners.

Judgment.

The Sappho to blame for the collision.

Unwillingness of the Court to allow salvage to be engrafted on collision suits.

DR. LUSHINGTON:—This was an action for salvage, which arose in consequence of a collision which took place between two vessels, the Salacia and the Sappho. The Court was of opinion, with the advice of the Trinity Masters, that the Sappho was to blame for these two vessels having come into contact. It has been truly observed by Dr. Bayford, that it is not usual for salvage suits to be brought by one of the parties to a collision against the other, and the Court is very much indisposed to encourage suits of salvage, engrafted upon collision, in the manner in which it may be attempted to be done in many cases. True it is there have been, and may be, cases in which the salvage is so entirely distinct from the collision itself, that the parties performing that salvage are fully and fairly entitled to remuneration beyond being indemnified for the damage the vessel may have received by the collision, provided their services may have been invoked. But, generally speaking, the Court would be very reluctant, where small services were rendered in consequence of

collision, to see them made the subject of salvage suits. In the present case it is necessary for me to see in what the alleged salvage services consist—whether they are properly to be considered salvage services; and, if they are, what is the amount of remuneration, in proportion to the value of the property alleged to have been saved, which the Court ought to allot. These services are set forth in the act on petition, and I think they are very loosely stated. There is some degree of incorrectness—looking at the whole of the evidence in this case and in the damage suit—which has crept into this statement, I must, however, look to see, as far as I can, what are alleged to be the substantial merits of the asserted salvors. They state that the collision took place, the particulars of which I need not go into very minutely, for they have been sufficiently discussed, and they allege that “the two vessels swung round together, the cable of the *Salacia* overlying that of the *Sappho*; that the *Sappho* was very much injured by the collision, and made much water, and was in great danger of sinking.” It appears to me that there is some confusion in this statement between the actual state and condition of the *Sappho* at the period when the two vessels came into collision, and what her state and condition was on the following day, namely, on the 12th September. I do not mean thereby to say the *Sappho* was not in a state of danger from receiving very serious injury, because I think the facts in this case show that she, being a vessel of 416 tons, coming in contact with a vessel double her size, was in imminent risk of danger from such contact; but I do not think there was “great danger of sinking,” and it was not an appropriate term to use. They say—“She immediately hung out signals of distress, and hoisted her ensign union down; that it being impossible to clear the ships from each other, the master and crew of the *Salacia* got out springs”—this I presume to be the first intended act of salvage—“and made them fast on board the *Sappho*, and hung her to the *Salacia* to prevent her sinking, and cut up the *Salacia*’s tow-line and warps, and made fenders to save the vessels”—both of the vessels—“and lessen the danger to them, and particularly to the *Sappho*, which was the smaller and weaker ship, and the most injured of the two.” And, according to the best judgment I can form on the present occasion, the *Sappho* being the weaker vessel, the probability was that she would receive more serious damage than the *Salacia*. In truth and in fact, however, the application of those fenders was, as has been argued, and I think hardly denied upon the other side, for the benefit of both vessels, and it was not probably more necessary and indispensable for the safety of the *Sappho* than it was for the

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Were salvage services rendered in this case?

Act on petition.

Some of the steps taken were for the benefit of both vessels.

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security of the *Salacia*. Now, it is very questionable to me whether that can distinctly be called an act of salvage service; for it is clear that in the action for damage the owners of the *Salacia* will be entitled to recover any loss which they might have sustained by the use of these materials. Then the salvors go on to say, "that shortly after the collision the officers of the *Sappho*, thinking and declaring that she was sinking, ordered her crew, who were hard at work at the pumps, to get all ready to leave her." Now I think that averment is not satisfactorily proved. "That the master and mate of the *Salacia* thereupon encouraged the officers and crew of the *Sappho*"—that is clearly no act of salvage at all. They promised "to render them all the assistance in their power, and continued to renew the springs by which the vessels were fastened together, and which often broke through the violence of their pitching; that the officers and crew of the *Salacia* then moved the effects of those of the *Sappho* on board the former vessel, and also removed on board her the *Sappho*'s light chains, sails, provisions and a part of her cargo, and they continued night and day to render all the assistance in their power to the *Sappho*, which services were attended with danger and with much labour and fatigue, until she was taken into Balaklava Harbour." Now, this is a general account of all that was done during the days of the 11th and 12th. There is no specification of what was done on one day or the other, but it is mixed up, not in a very clear and definite form.

Removal of
property of the
nature of sal-
vage.

It cannot be denied that the removal of part of the property from on board the *Sappho* to the *Salacia* was a salvage service. That any danger was incurred by the crew of the *Salacia* I am at a loss to conceive. That there was labour I believe, for it is scarcely possible that these two vessels could have continued in contact in the manner they were without all parties undergoing considerable labour and fatigue. There is a good deal alleged which does not constitute salvage service at all. But the salvors go on to say, "That from three o'clock in the morning of the 11th of September, until the *Sappho* was taken in tow by the steamer on the morning of the following day, the exertions of the master, officers and crew of the *Salacia* were incessant in saving the *Sappho* and her cargo, and were accompanied by danger and risk, and that but for the services so rendered the *Sappho* and her cargo must have gone down at her anchors or been driven to sea in a sinking condition, and inevitably have been totally lost." Now, I am of opinion that these averments are far too strong, and not consistent with the facts; but I do think that though these averments cannot be supported by the evidence, yet that some service was rendered for the purpose of

Exaggerated
statement of
the salvors.

saving the Sappho, independent of the steps taken in consequence of the collision, but to a very small extent indeed. What the Court regrets is this, that in the case of the defendants, instead of a simple statement of facts—that the salvors used the fenders, and took on board some part of the cargo—instead of meeting it so, the Court is plunged into a statement of no less than three sides of paper. And here I find a statement which the Queen's Advocate commented upon, and on which also I think it right to comment, namely, a charge against the master which has no reference to salvage at all, and which has been most improperly introduced. One great object in the pleadings in these cases is to get justice done as soon as possible, and at a small expense. There is not only an answer, but it is followed up by an affidavit from the master, which goes to a statement utterly irrelevant to the main issue in the case, and tends to no other end than to increase the expense. Had it not been for the introduction of this irrelevant matter, the Court would have esteemed the services rendered of so low and inferior a character, that, though it would have given a small sum, it would not have given the full costs of the proceedings; but when I see that the salvors have been led by the owners into these long pleadings, it is the duty of the Court to check it. I shall give a small sum in the nature of salvage; I shall give 80*l.*, and I shall also give costs, with the hope of stopping this mode of proceeding.

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June 3.Irrelevant
statement of
the owners.

Nicholson, proctor for the salvors.

Rothery for the Sappho.



THE CITY OF LONDON, W. CAMPBELL, *Master*.

*Collision—Steamer and Smack—Lights—17 & 18 Vict. c. 104,
Sect. 298.*

The smack *C.* was hove to, reefing her mainsail, the night clear with moonlight; she saw a steamer approaching, hailed her, but showed no light; the steamer did not see the smack until she was close upon her, when she ported her helm and a collision ensued:—

Held, that the fact of its being a bright night did not relieve the smack from the necessity of observing the Admiralty regulations as to showing a light: and that if a light had been shown, there would probably have been no collision.

THIS was a suit promoted by the smack *Celerity*, of sixty-four tons, against the steam-ship *City of London*. The collision occurred at about 7 p.m. of the 3rd of January, 1857,

June 5.

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June 5.

abreast of Goldner's Gat, at the lower end of the Gunfleet Sand, in the river Thames. The night was clear and moonlight, and the wind was blowing hard. On the part of the smack it was alleged that she was hove to for the purpose of reefing her mainsail, that her mainsail was lowered down, her foresail set a-weather, and her jib filled; that her master was at the helm, keeping her just full on the starboard tack, but that she lay nearly dead on the water, making little or no way; that at this time those on board the smack observed the red light of a steamer proceeding in a direction which would have carried her clear of the smack, but that about six minutes afterwards the green light suddenly appeared, and she was seen bearing down upon them; that the smack's helm was immediately lashed a-port, and the steamer hailed, but she came on at the rate of from twelve to fourteen miles an hour, and with her port fore-sponson struck the smack on the starboard side of the stem, doing her so much damage that she sunk in less than two minutes, taking the mate and an apprentice down with her. The master and the rest of the crew saved themselves by getting into their boat. On behalf of the steamer it was stated that she was proceeding down the river with the Admiralty regulation lights, when she suddenly saw the smack at the distance of only about thirty yards, nearly end on, and without any light exhibited; that the helm was immediately ported, but not in time to clear the smack, and she attributed the collision to the omission of the smack's people to hoist a light. The smack attributed the collision to the want of a good look-out on board the steamer, and alleged that, "by reason of the clearness of the night and the brightness of the moon, the collision was not and could not have been caused by the omission of those on board the smack to exhibit a light."

Jenner and Deane were heard for the Celerity.

The *Queen's Advocate* and *Robertson* for the City of London.

The Court was assisted by Captains *Redman* and *Pelly*.

Judgment.

DR. LUSHINGTON, addressing the Elder Brethren, said:—Gentlemen, it is now my duty to state to you briefly the circumstances of this case, and the questions which appear to me to arise upon the law, and the facts as proved in evidence. I observed just now that, whatever may have been the decision of the Board of Trade, it is impossible it can govern the judgment of this Court, and for very obvious reasons. I do not know upon

Decision of the
Board of Trade
cannot govern
this Court.

what evidence that decision was founded, whether the same witnesses were examined as before this Court, and whether all the questions, which form a part of the case now before us, were comprised in the issue of the case before the Board of Trade; it is quite manifest, therefore, our decision must be governed, not by anything which has been decided elsewhere, but by the pleadings and the evidence before us. As I am desirous to keep entirely distinct the conduct of the two vessels, I will first submit to your consideration whether or not the steamer was to blame in any respect for this collision; and, secondly, I will request your opinion as to the conduct of those on board the fishing smack which has been run down. There is very little dispute as to some of the main facts that occurred. There is no dispute as to the place of collision, or as to the state of the weather, or as to its having been clear and moonlight, and the wind is stated on both sides to have been blowing hard. It is also admitted that the steamer was carrying her proper lights, and that the smack showed no light at all. Now the steamer was running down the river, according to her own statement, at the rate of eleven knots an hour, and she considered herself justified in so doing, I presume on account of the state of the night. It is stated in the evidence that she had four persons on the look-out, and the question arises why she did not see the *Celerity*, which is a smack of sixty tons, in time to avoid the collision. Her answer is, that notwithstanding the state of the night, the *Celerity* was a small vessel, and the moon shone in such a direction upon the white sails that it was impossible to see her at an earlier period, and to adopt other measures than they did adopt, in order to avoid the collision; in point of fact, that, so far as related to the steamer herself, it was an inevitable accident. Now I must request your attention to the evidence given on behalf of the steamer in this respect. Nearly all the witnesses that have been examined say that they could see the hull of the vessel before they saw the sails, and upon the truth of that evidence you must form your own opinion. The real question is this, and it is twofold, whether they did not in point of fact see the hull of the vessel, or whether they might not have seen the hull at an earlier period, and so have avoided the collision. I will request your attention to the evidence of *Bake*, because it appears to me to be exceedingly important. *Campbell*, the master, says very little upon this question. *Bake*, on cross-examination, says—"I should say I could see the hull of a vessel under weigh about a mile and a half, or a couple of miles, at the time of the collision." He says nothing as to the size of the vessel he could see at sea, and he

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June 5.Case of the
steamer.Evidence of
her crew.

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June 5.

might have been speaking of vessels of much larger dimensions than the one at present under consideration. He says—"I could see a vessel at anchor, without a distinguishing light, a mile or three quarters of a mile off; that is to say, a fair-sized vessel." It is for you to compare in your own minds the difference between his seeing a fair-sized vessel three quarters of a mile off and at what distance he could see a small vessel of this kind. He goes on to say—"I could see a vessel of sixty tons, without a light, at anchor, on the evening in question, if deeply laden as the smack was, not more than a quarter of a mile off." Then, according to this statement, as I read it, and the opinion of this person, looking at the state of the weather, the size of the smack, and the cargo on board her, she might have been seen at the distance of a quarter of a mile off. If she might have been seen at that distance it will be a question for your consideration whether the steamer going at eleven knots an hour might not have avoided the collision. Wallace, the next witness, says—"If the moon was shining in the back of her sails I could see a brig under weigh a long distance, but if shining in the front of her sails I could see her no distance. I could see her hull, but I could not see her sails at all until she was close. I could see her hull, I cannot say the distance exactly. I could see her hull perhaps about half a mile or so." Here again you must make allowance for the expression used, and remember this is a smack of sixty tons only. He says—"I could see a brig at anchor without a light, about as far as half a mile." This is the evidence given by these witnesses, and it appears, according to their statement, that they saw the hull of the vessel before they saw the sails. The first question for your determination will be, whether under these circumstances, supposing the look-out to have been really an effective and good look-out, they ought not to have seen this smack, notwithstanding no light was hoisted, in time to have avoided the collision. We will now consider the case of the smack. She was hove to, according to her statement, for the purpose of reefing her mainsail, and it is admitted that she showed no light of any kind; and it is perfectly clear, from the evidence in the case, she had ample time to have hoisted and shown a light if she had been minded so to have done. This raises a mixed question of fact and law, which appears to me to be one of no small importance. We know that the Admiralty are empowered by Act of Parliament to make regulations requiring the exhibition of lights by certain classes of ships; and the 298th section of the Merchant Shipping Act, which is of great importance, enacts, that "If in any case of collision it

Did the steamer see the smack as soon as she might have done?

Case of the smack.

The smack showed no light—was she justified?

appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any such rule for the exhibition of lights, the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it can be shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary." Now one of the rules issued by the Lords of the Admiralty is the following (a):—"We hereby require that all sailing vessels, when under sail or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision." Now I assume, though it is entirely a matter for your determination, that this vessel must be considered, though she was hove to, as a sailing vessel under sail. Assuming that she must be deemed a sailing vessel under sail, then the question arises whether the collision was occasioned by the non-exhibition of a light. It is stated in the section of the statute to which I have adverted, that she shall not recover if it appear that such collision was occasioned by the non-observance of the rule for the exhibition of lights, unless it be shown to the satisfaction of the Court that the circumstances of the case made a departure from the rule necessary. I have not the least hesitation in telling you that, in my opinion, there were no circumstances which rendered a departure from the rule necessary. It is not to be said because it was a bright night that it was not necessary to obey the Act of Parliament. The question is, whether the collision was occasioned by the non-exhibition of a light, whether you are of opinion it was occasioned by the want of a good look-out on board the steamer, or whether you think that if there had been a light on board the smack the steamer would have seen it, and in all probability have avoided the collision.

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Admiralty Regulations as to lights.

There were no circumstances, which rendered a departure from the rule necessary.

Did the omission to show a light occasion the collision.

The Court and the Elder Brethren having retired for consultation, on their return,

DR. LUSHINGTON said:—The Gentlemen by whom the Court is assisted are of opinion that there were no circumstances to justify the smack's departure from the rule, and that if a light had been shown there would in all probability have been no collision. The Court is therefore bound to pronounce that

Smack to blame.

(a) Appendix No. I.

1857. the smack cannot recover, and to dismiss the steamer with
June 5. costs.

Jenner, proctor for the *Celerity*.

Farquhar for the City of London.

THE CERES, G. BATEMAN, *Master*.

Collision—Barge and Steamer—Lights—17 & 18 Vict. c. 104,
s. 298.

A barge going down the river saw the red light of a steamer broad on her port bow, and took no steps; shortly after the steamer's green light suddenly opened, showing that the steamer had starboarded her helm and was coming direct towards her; the master of the barge instantly showed a light and ported:—Held, that the vessels were not approaching, in the first instance, within the meaning of the Admiralty Rules, and that the barge was not to blame.

The steamer starboarded to come to anchor because the night was very dark:—Held, that she should have eased her engines, and proceeded with more caution in so doing.

June 13.

THIS was a suit for damage brought by the owners of the barge *Harmony* and cargo against the screw steamship *Ceres*. It was alleged, on behalf of the barge, that she was on a voyage from London to Faversham, and at about 4 A.M. of the 12th of October last was about half a mile above the Nore Light, steering S.E. by S., the wind being extremely light from the northward; the tide about half-ebb, and the night very dark and drizzling. All hands were on deck keeping a good look out, and the barge was making little more than driftway, when the red light of a steamer (the *Ceres*) was observed broad on the barge's port bow, distant above a mile, and steering far to the northward of her. That the barge therefore continued her course without alteration; but that in three or four minutes afterwards the green light of the steamer suddenly opened, whereupon the master instantly took the lantern from the locker and held it high up towards the steamer, at the same time putting the helm hard a-port, which, owing to the lightness of the wind, produced little or no effect; that all hands shouted to the steamer, but that the latter continued her course without alteration, and in about three or four minutes after the green light had been seen, ran stem on into the barge's midships, in consequence whereof the barge presently sunk; they attributed the

collision to the steamer not having kept a proper look out. The defence of the *Ceres* was, that on arriving at the entrance to the Thames, on her voyage from Rotterdam, the morning became so dark and thick with drizzling rain, that it was impossible to distinguish vessels of small tonnage until close upon them; that consequently the master ordered her to be brought up, to await daylight or a change of weather; that preparatory to letting go her anchor her helm was put to starboard to bring her head to the southward, but that almost immediately afterwards the light of the *Harmony* was seen right ahead, at the distance of about 200 feet only, upon which the helm of the steamer, then a-starboard, was put hard a-starboard, and her engines eased and stopped; but before the engines could be reversed she struck the *Harmony*, which was coming down with the ebb-tide, on her port side near the mast. They attributed the collision to the *Harmony* not having exhibited a light in sufficient time to enable the steamer to avoid her.

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The Court was assisted by Captains *Pixley* and *Owen*.

Bayford and *Deane* appeared for the *Harmony*.

Addams and *Twiss* for the *Ceres*.

DR. LUSHINGTON (addressing the Trinity Masters), said :— Judgment.
Gentlemen, I must, in the first instance, request your attention to the case of the barge. The question for your consideration will be, whether there has been, on her part, any violation of the rule laid down by the Lords of the Admiralty (a), “that all sailing vessels, when under sail or being towed, *approaching, or being approached, by any other vessel*, shall show between sunset and sunrise a bright light in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid a collision;” for there is a provision in the statute, that if a collision be occasioned by the non-observance of this rule, the owners of the vessel violating the rule shall not recover any damages whatever, either in this or in any other Court. The question therefore is, whether there has been any departure from, or violation of the rule, according to its true interpretation. It is admitted, on behalf of the barge, that she did see the red light, and that she did not then show a light. If that is a violation of the rule then she is out of Court. But, looking at all the circumstances of the case, the relative position of the two vessels and their

Admiralty Regulations as to showing light.

(a) Vide Appendix No. I.

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June 13.

Were the vessels "approaching," within the meaning of the Act?

Ought the steamer not to have taken every precaution to see that all was clear before altering her course?

Barge not to blame.

Steamer should have used more caution.

respective courses, could they be said to be approaching within the true meaning of the rule? The course of the barge was S.E. by S., and the steamer's, though it is not specifically stated, must, I apprehend, have been to the northward of W. Under these circumstances, then, the barge descried the red light; and it seems clear, that if she saw the red light on her port bow, and the courses of the vessels were as stated, these vessels would have gone well clear of each other. You will therefore consider whether the term "approaching or being approached by any other vessel" can apply to vessels in the relative positions in which these two vessels were. This is the first branch of the question. The next point is, if there has not been a violation of the rule on the part of the barge in not exhibiting a light when the red light only of the steamer was visible, whether she did as soon as possible after the appearance of the green light exhibit her light to the steamer. If so, then the barge is not to blame. Then, as to the conduct of the steamer. According to her statement, the night being so very dark she deemed it prudent to come to anchor, and for that purpose she starboarded her helm to bring her to the southward of mid-channel. Whether that was a proper measure to adopt, you, gentlemen, are the best judges; but it seems clear, that before adopting such a measure, and thus deviating from her course, she ought to have taken the greatest possible precaution to have seen that all was clear around her. The question, therefore, will be, whether, if she had taken such due precaution, she might not have seen the light of the barge in sufficient time to have avoided the collision.

The Court and the Elder Brethren having retired for consultation, on their return,

The learned JUDGE said:—The gentlemen by whom the Court is assisted are of opinion that, looking at all the circumstances of the case and the direction in which the red light was seen, the barge was not called upon to show a light until after the green light became visible. They also think that the barge did show a light as soon after the green light appeared as she could, and that she has not violated the rule. They are further of opinion that the steamer, if desirous of coming to anchor, should have done so more cautiously, and have eased her speed. I must therefore pronounce for the damage.

Stokes, proctor for the *Harmony*.

F. Clarkson for the *Ceres*.

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June 13.THE URANIA, JOSEPH HAIGH, *Master*.*Collision—Barque and Steamer—Lights.*

A barque, close-hauled on the starboard tack, with a lantern with three glasses of different colours at her bowsprit end, saw the red light of a steamer to windward and nearly abeam—she kept her course, and, as she alleged, on the steamer nearing her, showed a bright light over the starboard quarter, but a collision ensued.

Held, that the barque's light at her bowsprit end was not a sufficient light in accordance with the Admiralty Regulations; and that it was not proved that she showed the other light in sufficient time—on the other hand, that the steamer had not a sufficient look-out. Suit dismissed, but without costs.

THIS was a suit for damage, brought by the owners of the barque Midlothian against the screw steamer Urania. The collision occurred about 10 P.M. of the 18th of February, 1857, fifteen or sixteen miles to the eastward of the mouth of the Humber. On the part of the barque it was alleged that she was steering S.E. by S., close hauled on the starboard tack, under all plain sail, with the wind S.W. by S.; that she had a clear, bright regulation light at her bowsprit end, and new white sails, and that the night was fine, clear and starlight; that the red light of the Urania was first seen upwards of three miles to windward, and nearly abeam of the barque, which was then kept as close to the wind as she would lie so as to remain under command; that the red light was attentively watched till it was within a mile and the smoke of the steamer was visible; that the mate then took a clear signal lantern, burning brightly, from the top of the binnacle, and held it up over the starboard quarter, and at the same time shouted to the steamer; that, nevertheless, the steamer continued her course and ran stem on into the starboard side of the barque, abaft the forerigging, doing very considerable damage, and they attributed the collision to the Urania not keeping clear of the Midlothian, by going astern of her or otherwise. The Urania, in defence, alleged that she was steering north and by west, making about six knots only, the night being cloudy, and so dark that a vessel without a light could be seen but at a very short distance; that suddenly a light became visible from one to two points on the Urania's port bow, where neither light nor vessel had previously been visible, although a vigilant look-out had been kept; that the Urania's helm was immediately put hard a-port, and her engines were stopped and reversed full

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speed, but that the barque had approached her so close before showing the light that a collision was inevitable; and the Midlothian ran athwart hawse of the *Urania* at the rate of five or six knots, and with her starboard side struck the steamer's stem with such violence as to turn it towards the starboard bow. She also alleged, in contradiction to the plea of the Midlothian, that the night was not fine nor clear, nor starlight; and that the barque had not a clear, bright regulation light, but a lamp only with three glasses of different colours, which neither was nor could be seen by the *Urania* until the vessels were close together; and they attributed the collision to the Midlothian not having exhibited, in pursuance of the Admiralty regulations to that effect, a bright light in a position whence it could be best seen by those on board the *Urania* in sufficient time to enable them to avoid a collision.

Bayford and *Deane* appeared for the barque.

Addams and *Twiss* for the *Urania*.

The Court was assisted by Captains *Pixley* and *Owen*.

Judgment.

The steamer to blame, unless she can show that the Midlothian did not exhibit a proper light.

She had a lantern hung at her bowsprit end.

Was it a sufficient light?

DR. LUSHINGTON (addressing the Trinity Masters) said:—Gentlemen, It appears from the evidence that the Midlothian was close-hauled upon the starboard tack, steering about S.E. by S., and that she sighted the red light of the steamer about her starboard beam, and kept her course. The steamer was steering about north and by west, and was proceeding at the rate of six or seven knots an hour. There is no doubt, therefore, that the steamer is to blame for not having avoided this collision, unless it should appear that the Midlothian is to blame for not having given due notice to the steamer by the proper exhibition of a light. In the pleadings this point of the defence is thus stated: "that the collision is imputable to those on board the Midlothian in not having exhibited, in pursuance of the Admiralty regulations, a bright light, in a position whence it could be best seen on board the *Urania*, in sufficient time to enable them to avoid the collision." The question is, whether or not the Midlothian did show, in compliance with the Admiralty regulations, a sufficient light in sufficient time. Now, it is not disputed, that she had the three-coloured lantern, which we have seen exhibited this morning, suspended at her bowsprit end. I can form no opinion whether that is a sufficient light, or whether its being suspended there was a compliance with the Admiralty re-

gulations. That is a question for you to determine. If you are of opinion that such a light was sufficient, and was exhibited in compliance with the requirements of the Admiralty, the question is at an end, because there is no doubt that it was exhibited in due time. If, however, you are of opinion that the light was insufficient, then another question arises—whether those on board the *Midlothian* did exhibit another bright light, and in sufficient time. The *onus* of proving the affirmative will, of course, lie upon the *Midlothian*, and I must say the evidence is very conflicting and unsatisfactory, and not such as we had a right to expect. However, we must consider whether or not it does establish as a fact that they did show a sufficient light, and in due time. The only other question argued is, whether the *Midlothian* was wrong in starboarding her helm, though I do not think that that question fairly arises in the case, inasmuch as it was not alleged in plea.

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The Court and the Elder Brethren having retired for consultation, on their return the learned Judge said:—The *Trinity Masters* are of opinion that the light at the bowsprit end was not a sufficient light according to the Admiralty requirements, and we are all of opinion that the affirmative is not proved by the *Midlothian*, that she did exhibit a bright light in sufficient time. At the same time we are of opinion that there was an absence of that vigilance on board the steamer which the circumstances required. The result is, that, notwithstanding the steamer is to blame, the *Midlothian*, being also to blame for non-compliance with the Admiralty regulations, is barred of recovery by the statute. I must therefore dismiss the steamer, but under the circumstances shall give no costs.

Barque did not
show a *sufficient*
light in *suf-*
ficient time

No sufficient
look-out on
the steamer.

Suit dismissed,
but without
costs.

Stokes, proctor for the *Midlothian*.

F. Clarkson, proctor for the *Urania*.



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July 7.THE MOBILE, PONSONBY, *Master*.

*Ship—Seamen's Wages—13 & 14 Vict. c. 93, s. 98—
Conditional Tender—Costs.*

The *Mobile* arrived at Port Philip, where some of her crew deserted. The master gave promissory notes for 40*l.* each to the remaining part of the crew, in addition to the wages by the ship's articles, to navigate the ship, so short-handed, to Bombay. He there engaged additional hands, and arrived at Liverpool. The owners then offered the sailors who held the promissory notes the amount of their wages, according to the ship's articles, on condition of their signing a release in full, and giving up the promissory notes. Some of the seamen refused to do this, and brought a suit in this Court for the wages only, which they recovered. On the question of costs :

Held, that such a conditional tender on behalf of the owners was insufficient, and made with a view of availing themselves of the letter of the Statute to prejudice the question between themselves and the seamen as to the promissory notes, which has since been decided by the Queen's Bench in favour of the seamen, and that the owners were liable to the whole costs incurred in the Admiralty Court.

THIS was a question of costs arising out of a suit for wages against the owners of the *Mobile*, under circumstances sufficiently stated in the judgment.

The 170th and following sections of the Merchant Shipping Act of 1854 replace the corresponding sections of the Mercantile Marine Act, 1850, which was in force when the facts of the present case occurred.

This case was argued in November, 1854, by the *Queen's Advocate* (Sir *J. D. Harding*) and *Spinks* for the seamen.

Addams for the owners.

The Court deferred its judgment till the action on certain promissory notes mentioned in the judgment should have been decided. The action was not finally concluded till June, 1857 (*Hartley v. Ponsonby*, 7 E. & Bl. 872).

Judgment.

Course of proceedings.

DR. LUSHINGTON:—The present question is confined to the costs of the suit, and it arises under the following circumstances. A claim for wages was preferred on behalf of several seamen, and an appearance having been given for the owners, an act on petition was given in on their behalf, and the defence set up in it was, that the men had been paid the whole amount of wages due to them; that such sums had been previously tendered to

them in full satisfaction of their wages; and it was contended that no costs were due. The proctor for the seamen had previously declared that he would accept the sum tendered to them without prejudice to the question of costs. This act on petition has been written to several times and at great length, and I have now to determine whether, under all the circumstances of this case, the Court ought to decree costs to the seamen or not. The act on behalf of the owners commenced by stating that Evan Davis, one of the parties, had been paid his wages, and that the proctor had brought in certain sums of money, being the whole of the wages due to the other seamen; and as to the costs, it was alleged, that at 10 o'clock a.m. June 18th, a clerk to the managing owners attended at the office of the Shipping Master at Liverpool, and then delivered the accounts, which were confirmed by the shipping master; that on June 20th, Ponsonby, the master of the ship, again attended and tendered the seamen the amount of wages due, which they refused to accept; that this he repeated for three days following, but they all refused to receive their wages except Davis; that on June 23rd the vessel was arrested. The answer on the part of the seamen sets forth all the circumstances relating to the voyage, but I need only advert to those which are the most material as to the question before me. It appears that this ship arrived at Port Philip on October 9, 1852; that seventeen of the crew deserted; that those who did not desert were nineteen in number, and Ponsonby offered to give them 40*l.* a-piece in addition to their wages if they would navigate the ship to Bombay; and that he gave each of them a note for 40*l.*, and that they did accordingly navigate the ship, and afterwards fresh additional hands were hired at Bombay, and the ship was brought to Liverpool. They admit that Ponsonby offered to pay them the balance of wages due according to his own account, but subject to certain conditions; they say that on June 20th the accounts were delivered, but not before, and that the accounts contain no allusion to moneys for extra services, and that a demand was made for releases of all the wages which might be due, and that he required them to sign such releases and give up the promissory notes. They then say they took advice, and under legal advice a letter was written demanding payment of the wages, including the notes, and that the answer, which is stated at length in the Act, informed them that their claim under the promissory notes would be resisted. They then averred, that it was agreed between the solicitors on both sides that the wages should be paid without prejudice to the claim for extra wages, and receipts were accordingly drawn and settled by both the

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Are the seamen entitled to costs?

Statement of owners.

Tender of wages before the shipping master refused.

Answer of the seamen.

Desertion of several of the crew at Port Philip.

Notes for 40*l.* each to the remainder in addition to their wages.

Wages tendered only on conditions.

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Claim on the
promissory
note not prose-
cuted in this
Court, but by
action in Q. B.
Reply of the
owners.

Rejoinder.

And other
pleadings.

solicitors, and the solicitors for the owners required that the payment should be made in the presence of the shipping master, and that receipts should be given according to the 98th section of the Statute of 1850 (the 13 & 14 Vict. c. 93), then in force, and upon this the parties differed, the seamen being advised, that the signing such receipt would bar their claim upon the promissory notes. Notice was sent to the solicitor for the owners, that the solicitor for the sailors would attend at the Sailors' Home at 4 o'clock and demand payment according to the engagement proposed; that he did so attend, and that no one appeared. This answer concludes by denying that the wages have been repeatedly tendered or refused in June; but states that on 11th July the proctor for the seamen informed the proctor for the owners that his parties would not proceed further in this Court in respect of the promissory notes, and that actions were brought in the Queen's Bench on that account. In reply on behalf of the owners, the circumstances occurring at Port Philip are stated at length, but it is wholly unnecessary to refer to them, and for an obvious reason; that the actions brought have been tried, and it has been ultimately determined that the sailors are entitled to recover on the promissory notes claimed, and consequently no culpability attaches to them upon account of the transaction at Port Philip (a). Of course, I must presume that all the circumstances necessary to the defence were brought before the Court of Common Law on behalf of the owners. Then follows a denial that any agreement was entered into that the wages should be paid without prejudice to further claims, and a letter is set forth, dated June 21st, denying such an agreement. With respect to the rejoinder, it is not necessary that I should enter into particulars, for it relates only to what occurred in Australia. It then sets forth a letter of great length; a letter addressed to the solicitor of the owner, written by the clerk of the solicitor for the sailors; it is dated June 22; it states that the master had declared that he would not pay the promissory notes, but only the wages; and, before paying them, should require the notes to be given up, and the release signed. It states the signature of the receipts, the rejection of them by Messrs. Harvey & Co., and the demand to go before the shipping master—the letter goes into further detail, which I do not think I need follow. Then comes a surrejoinder, which appears to be irrelevant to the present case, after this a rebutter, which I shall pass over also, and then a surrebutter, and finally another pleading, to which I have no name to give; and this brings another detailed statement on the part of

(a) 7 E. & Bl. 872.

the owners. [The *Queen's Advocate* observed, that certain of these pleas had been admitted by the Court after opposition.] True, *Queen's Advocate*, but the Court cannot always determine what is relevant till the whole case is before it. Here is all this voluminous pleading, and all this, for the most part, irrelevant matter, for the purpose of ascertaining the simple fact material to the issue in this cause. The question is, whether costs are due to the sailors, and whether a tender was made without a demand for a release which might affect the claim of the sailors to the promissory notes. And I am of opinion that the owners, if they had been disposed, and had not intended to take advantage of the forms of the Act to bar the claims of the sailors, might without difficulty have made a tender without prejudice to the question of the promissory notes. Nothing would have been more simple than to have tendered the wages, asking for a release under the statute, if they had thought fit, payment being made before the shipping master, and then to have offered a memorandum that such payment and receipt should not prejudice the claim of the seamen under the promissory notes, or be given in evidence in any suit brought on the notes. This is what justice and equity required, and what the owners have not done; but they have, as I think, endeavoured to avail themselves of the formal words of the statute for the purpose of eluding, by a sidewind, the claim of the sailors; that claim has now been held, after great consideration, to be a lawful claim; and on every ground I am of opinion that the seamen are entitled to their costs; and I must add, that I think the affidavits produced on behalf of the owners are not so drawn as to prove the truth of the case, that they omit to answer what is most important, and are, in some respects, evasive.

Pritchard, proctor for the seamen.

Rothery for the owners.

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For the most
part irrelevant.

Real questions.
Are costs due?
Was the tender
of wages fairly
made?

The owners
availed them-
selves of the
letter of the
Act to bar
what has since
been declared
to have been
a lawful claim.

And the sea-
men are enti-
tled to costs.

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THE NORDSTJERNEN, C. PETERSEN, *Master.*

Foreign Ship—Suit for Necessaries—Shipbuilder's Lien on Vessel in his Yard.

A foreign ship was arrested, for necessities supplied, by D., being at the time on a slip in the building yard of C. at Great Grimsby. On affidavit from D. that the amounts claimed would exceed the present value of the ship, and that the vessel was rapidly deteriorating, the Judge ordered her removal from the building yard, and appraisal and sale without prejudice to the claim or lien of C. for rent and other charges on the proceeds of the sale.

IN this case an action had been entered on behalf of Charles Henry Donner and Oscar Steweni against the foreign ship Nordstjernen for necessities supplied; the warrant had been returned and the third default granted. Coote now, as proctor for the above firm, brought in an affidavit of Henry Donner and another, and an affidavit of Henry Donner and two others, and alleged that previously to the arrest of the ship in this cause, she had been placed for repair, and had since remained on a slip in the yard at Great Grimsby belonging to William Collinson, who claimed a lien on the said ship for repairs done thereto and for rent and other charges, that the amount due to Coote's parties for necessities, and the amount claimed by Collinson, would together exceed the present value of the ship, that she was rapidly deteriorating, and that it would be for the benefit of all concerned if she were immediately sold. He prayed the Judge to grant a commission for the removal of the ship from the ship-yard of William Collinson, and for the immediate appraisal and sale thereof, and also to give permission to his parties to make such necessary repairs to the said ship as should be requisite to ensure her safe removal.

Phillimore, A. A., moved the Court accordingly.

DR. LUSHINGTON granted a commission of sale and appraisal of the said ship, without prejudice, however, to the alleged claim and lien of William Collinson on the proceeds of the sale when brought in.

Coote, proctor for Messrs. Donner and Steweni.

Rothery, proctor for William Collinson.

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THE JANET WILSON, A. SKINNER, *Master*.

Ship—Sale under Bottomry Bond—Payment of Wages.

W., a shipowner, paid certain wages and other necessary disbursements after a bottomry bond had been given on the ship; the ship was sold at the suit of the bondholder. W. applied to be reimbursed the above payments out of the proceeds in the registry, which, if W.'s application had been granted, would not have been sufficient to meet the bond:

Held, that for such payments made without application to and leave from the Court, W. was not entitled to be reimbursed.

THIS was originally a cause of bottomry. The Court on a former court day having pronounced for the validity of the bond, application was now made on behalf of Mrs. Wilson, the former owner, for payment out of the proceeds in the registry of 425*l.* 15*s.* 9*d.*, which she had advanced for seamen's wages, pilotage and other necessary disbursements for the vessel, before, as was alleged, she was aware of the existence of the bottomry bond. For the bondholder it was contended, in opposition to this application, that part of the above sum was paid in discharge of wages earned prior to the advancement of moneys secured by the bottomry bond; that the greater part of it, viz. 328*l.* 5*s.* 3*d.*, was paid with a knowledge of the existence of the bond; and that the whole of the sum constituted a debt for which the shipowner was personally liable; and that for the payments made in discharge of such debts she had no lien on, and was therefore not entitled to be reimbursed out of, the proceeds of the ship and freight in the registry (*a*). It was also alleged, that after the satisfaction of prior claims the balance of the proceeds would be insufficient for payment of the amount of the bond.

The question was argued by *Addams* for Mrs. Wilson; by *Tristram* for the bondholder.

DR. LUSHINGTON:—It is perfectly true that under certain circumstances the mariner has a claim for wages which will take a preferential payment over a bottomry bond, but I do not think it is universally true that in all cases whatsoever the mariner is entitled to come to this Court and say, "I shall have my wages in preference to a bottomry bond." I have very great doubt in my own mind whether, where wages have been earned prior to the time when a bottomry bond has been given, a mariner has a

Judgment.

Mariners' claim for wages in some cases, but not in all, entitled to priority over a bottomry bond.

(*a*) See New Eagle, 4 Notes of Cases, 426.

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Where a bottomry bond has been given, a shipowner cannot, without leave of the Court, advance wages or other expenses, and claim to be repaid out of the proceeds, if the ship is afterwards sold by decree of Court.

right at all to come to this Court and say, "Let me have a preferential payment over the person who holds the bottomry bond:" and for the obvious reason, that the payment of those wages out of the proceeds of the ship is conditional upon the arrival of the ship in this country; and that that event was brought about by the bond having been given and the money having been advanced. In all ordinary cases, where the ship is of value sufficient to pay both the bondholder and the seamen, no controversy of course would arise. But with regard to the present motion, it goes the whole extent of this, that it is competent to the owner of a vessel on which a bottomry bond has been given, without leave or liberty from this Court, to pay and advance the whole of the wages and other expenses incurred, and then to come to the Court and say, "I paid them without the knowledge that a bottomry bond has been given, and I am entitled to be paid out of the proceeds." Now that is a doctrine to which I am not inclined to give my acquiescence, and I thought I had established, in preceding cases, the rule that it was not competent to any person, without leave of the Court, to pay wages which might have been incurred, and then come to the Court and make application to have that money refunded. I thought I had declared in former cases that it was necessary application should be made to the Court prior to the time the money was paid, for leave to make such payment, and then the Court would judge of the circumstances. I do not mean in an incidental motion like this to commit myself, and lay down any specific doctrine with regard to the payment of wages in preference to the payment of a bottomry bond. Under the circumstances of this case the owner of the vessel has made the payment without the consent of the bondholder, and without applying to the Court as she might have done, and I do not think she is entitled to come now and pray that the wages may be deducted, and to deprive the bondholder of that to which he is justly entitled. There is an action against a solvent owner for wages due, and the residence of the owner in Scotland is not, so far as I am aware, a bar to a personal action. I am not going to say that every bondholder is always to be relieved from all prior demands on account of the seamen; but vessels are sometimes chartered on voyages to the East Indies for at least two or three years, the masters are placed in the same position as the seamen, and large demands necessarily arise from the voyage, both on account of the wages due to the master as well as to the seamen; and if it were held as an universal principle that all these wages must be deducted before the bottomry bondholder was paid, it would destroy the very purpose for which bottomry bonds are

granted, and would be exceedingly prejudicial to the maritime interests of this country. I must reject this application.

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Nelson, proctor for Mrs. Wilson, the owner.

Bathurst for the bondholder.

THE CATHERINE, R. SWANSTONE, *Master*.

Bottomry Bond—Charter-Party—Premium of Insurance on Freight advanced.

The charterer may deduct from the freight payable to a bondholder the premium for insurance of part of the freight advanced according to stipulations in the charter-party before the bond was granted.

THIS was an application on the part of the charterer of a ship to allow a deduction of 32*l.* from the payment of freight to a bottomry bondholder, on account of premium on insurance on freight advanced before the bond was granted. It appeared that by charter-party entered into between Swanstone, the owner of the Catherine, and Brown the owner of the cargo, for the conveyance of such cargo from Ibraila to Hull, it was agreed that the freight for the conveyance of the cargo should be paid on its delivery, half in cash and half in a bill at three months' date on London, and that cash to be advanced on account of freight at the port of loading should be free of commission, but subject to insurance premium; that prior to the Catherine leaving Ibraila, Mr. Brown advanced and paid to Captain Swanstone, for payment of ship's disbursements, 185*l.*, to be deducted from the freight, free of interest, but subject to insurance; and that in December, 1856, Mr. Cunningham, the agent of Mr. Brown, advanced and paid to Captain Swanstone the further sum of 81*l.* 10*s.* to discharge the ship's lighterage and other expenses on leaving the Danube on account of freight, but subject to insurance premium; that such two sums were advanced to the said Captain Swanstone, subject to the condition set forth in the said charter-party, and for his benefit, as he would otherwise have been forced to raise the same on credit or by bottomry, and were advanced at the risk of Mr. Brown, as no freight had been earned or was due at such period; and that in the event of the Catherine having been lost on her voyage, no freight whatever would have been payable; and that, according to the custom of trade in the Danube, all sums, advanced by the owner of the cargo to the master of a vessel on account of freight to be earned, are so advanced subject to the

1857. insurance premium on such advance being deducted from the
July 30. freight.

Addams, in support of the motion.

Deane, *contra*.

Judgment.

DR. LUSHINGTON:—The advance on account of freight was made before the bond was given; the shipowner would have been liable to this deduction for premium of insurance; and the bondholder, who stands in the shipowner's place with reference to this freight, must also be subject to the same deduction.

Motion granted.

Nicholl, proctor for the charterer.

Bathurst for bondholder.

THE DUCHESSE DE BRABANT, M. VANDER STAVE,
Master.

Collision—Damage—Liability of Bail.

In a cause of damage the bail is only liable to the extent of the value of the ship and freight, and not for the full amount of the damage done, even though, as in the present case, bail may have been given for a sum beyond the value of the ship and freight.

THIS was originally a cause of damage, promoted by the English brig *Jason* and the French owner of the cargo on board thereof, against the Belgian barque *Duchesse de Brabant*. The Court, assisted by Trinity Masters, came to the conclusion that the barque was to blame for the collision. The value of the barque and freight was not sufficient to pay for the damage sustained by the brig and cargo; but the action had been entered and bail given to a much larger amount than the value of the barque and freight, and it was now sought to make the bail liable for the deficiency. On the other hand, it was contended that the Belgian law on this point was similar to our own, and that no owner of a Belgian vessel is liable in a cause of damage for more than the value of his ship and freight.

The case was argued by *Phillimore*, Admiralty Advocate, and *Deane* for the *Duchesse de Brabant*.

Addams and *Bayford* for the *Jason*.

Judgment.

DR. LUSHINGTON:—The Court is under great obligations to the Admiralty Advocate for the great pains he has taken on the

present occasion in bringing under its notice all the authorities that could bear on the sundry questions supposed to arise in this case. If it were necessary for me to determine those questions, I should certainly consult those authorities, and consider what my determination ought to be after having examined them; in which case Dr. Addams' remark on the saving clause, 516, at the end of Part IX. of the Merchant Shipping Act, would deserve attention. Part IX. determines the limitation of liability of shipowners, but the last clause runs as follows:—"Nothing in the ninth part of this Act contained shall be construed . . . to extend to any British ship not being a recognized British ship within the meaning of this Act." However, in my opinion, the judgment I ought to pronounce depends on very simple considerations, and upon facts which I shall presently state. It appears, in this case, that the vessel proceeded against is a Belgian vessel, that the ship injured was British owned, and the owners of the cargo on board her, who are also suing, are French. It would be, I think, a very difficult matter if the Court were under the obligation of deciding whether the statute applied to the British shipowner and not to the French owner of the cargo, and other questions of this description. The prayer on behalf of the Duchesse de Brabant is, that the Court should pronounce that the owner and the bail given on his behalf are not liable to answer for or make good the damage and losses sued and pronounced for in this cause to an extent beyond the value of the barque, the Duchesse de Brabant, and her freight. The prayer on the other side is, to pronounce that the owner of the barque and his bail are liable to make good the full amount of the damage sustained. The action was commenced, and bail seems to have been given, perhaps without much consideration, for the whole amount of the action, and without, perhaps, taking pains to inquire what was the value of the ship and freight proceeded against, or what was the amount of the damage that had actually been done. It would have been perfectly competent to the owners of the vessel proceeded against to have said, "We will bring in the freight and we will have the value of the vessel ascertained by appraisement, and we will give bail to that extent, and no further." The Court, according to its ordinary practice, would, under these circumstances, have released the ship from the arrest under which it remained. The important question which the Court has to ask itself is this, whether, from the mere fact of bail having been given for the full amount of the action, the Court is to consider the bail as bound to the full extent, or merely as in ordinary cases to the value of the ship and freight which has been earned on the voyage? I apprehend it would be attended with very great

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Facts of the
case.

Bail was given
for more than
the value of
ship and
freight.

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But it cannot
be enforced
beyond the
amount of the
value of ship
and freight.

inconvenience if the Court were always, on occasions like these, to require, before the bail was given, that the value of the ship and freight proceeded against should be accurately ascertained; and there have been many cases cited at the bar where, bail having been given for a larger amount than the value of the property, the amount has been reduced. I take it for granted, for the purpose of the present argument, that in all those cases the property was British, and therefore it was known that nothing could be recovered beyond the value of the ship and freight; but, though this be so, it appears to me not to affect the real merit of the question, as to whether the bail ought to be reduced to the value of the ship and freight. I think I should impose a very unjust measure if I were to hold, in a case where bail has been given to a larger amount, that the party is bound to that full extent, and not merely to the value of the ship and freight. I think I am bound in this case to reduce the amount of the bail to the value of the ship and freight. There are many difficult questions which have been raised in argument, upon which I pronounce no opinion on the present occasion—it will be time to consider them when they arise. I decide this case on the common ground that the bail ought, in justice and equity, and according to the practice of this Court, to be considered as bail, not for the amount of damage done, but for the value of the ship and freight proceeded against, and upon that ground I reject the prayer of the owner of the *Jason*.

The *Admiralty Advocate* :—Does the Court make any order as to costs ?

By the COURT :—I think it is a case for costs.

F. Clarkson, proctor for the *Jason*.

Nicholl for the *Duchesse de Brabant*.



1857.
November 13.

THE STANDARD, N. BRIDGES, *Master*.

Ship—Charter-party—Bottomry Bond—Freight.

T. chartered a ship, then on an outward voyage, to load a cargo at a port of Cuba for London, agreeing that his agent should make such advances at Cuba as he might think the ship required. The master gave a bottomry bond on ship and freight before she reached Cuba. Certain sums were advanced by charterer's agent at Cuba. Ship was arrested at suit of bondholder in London. T. brought in freight less the sums so advanced at Cuba :

Held, that such sums having been paid in pursuance of a contract, the payment was a good one, and that the charterer was entitled to deduct the amount from the gross freight.

IN April, 1856, this vessel, being then on a voyage to a port in the West Indies with cargo, was chartered by Mr. Tyrie to proceed, after having discharged her said outward cargo, to Barraçoa, in Cuba, and there load a cargo of timber on his account. The charter-party stipulated that Mr. Tyrie's agent at Barraçoa should advance 500 dollars to the master, and any other sum he, the agent, might consider the ship required ; Barraçoa being a port at which the owner had no agent or correspondent. Before reaching Barraçoa, the vessel put into St. Thomas, where some repairs were executed, and a bottomry bond on ship and freight was granted by the master on 10th October, 1856. On the 19th the vessel reached Barraçoa, and, in pursuance of the charter-party, the charterer's agent there advanced to the master for the ship's account certain sums of money. When the vessel reached London she was arrested, as was also her cargo for the freight, at the suit of the bondholder. The sum secured by the bond, with a maritime premium of 25 per cent., was 517*l.* 18*s.* 4*d.* There were also actions against the ship and freight for wages and towage. Mr. Tyrie brought into Court 76*l.* 11*s.* 3*d.* as the net balance of the freight, his account stating the gross freight at 487*l.* 10*s.*, from which he claimed to deduct 360*l.* 6*s.* 3*d.*, advanced at Barraçoa, in accordance with the terms of the charter-party ; a premium of insurance thereon, 38*l.* 12*s.* 6*d.* ; and 12*l.* for broker's commission on chartering the vessel. The bondholder, on the other hand, as the proceeds in the registry amounted only to 365*l.* 18*s.* 7*d.*, and were, therefore, wholly insufficient to meet his bond, independently of the claim for wages and towage, prayed the Court to order the balance of the freight, amounting to 410*l.* 18*s.* 9*d.*, to be brought into the registry, and to direct a monition to issue against Mr. Tyrie accordingly.

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November 13.*Addams* for the bondholder.*Deane* for the charterer.

Judgment.

Bottomry
bond on ship
and freight.Freight
brought in,
less the sums
advanced at
Cuba,in pursuance
of the charter-
party.A party is
bound to fulfil
his contract
unless stopped
by the au-
thority of a
competent
Court.

DR. LUSHINGTON :—This is an application on behalf of the holder of a bottomry bond, which has been pronounced valid, to direct further payment on account of freight which is liable under the bottomry bond. The bond was given at St. Thomas for the voyage thence to port or ports in Cuba, and so to London, on ship and freight at 25 per cent. maritime interest. The ship was arrested in London at the suit of the bondholder, and a sum of 76*l.* 11*s.* 3*d.* on account of freight brought in, and this is alleged to be the whole that is due. The charterer, being now called upon to give an account of freight in his hands, says, “I made payments in the island of Cuba to the amount of the difference, and that under the obligation of the terms of the charter-party.” The question is, is such payment a fair deduction? It is not merely that such sum was paid in Cuba, but that it was so paid in pursuance of a prior agreement contained in the charter-party. It is clear that when freight is included in a bottomry bond, any portion of the freight which has been paid anterior to the date of the bond is not subject to it. But the important point here is, whether an advance, which is contracted by the charter-party to be made on account of freight *hereafter to be earned*, ought not to be made in accordance with the terms of the charter-party, unless the party is estopped from carrying out his contract by any proceedings in a Court of Justice; and if so made, whether it ought not to stand as a good payment, and so far relieve the charterer. I will take the case of a ship arriving in this country, and where the freight is to be paid to a third party; and I will suppose that, prior to the authority of this Court being invoked, the freight has, in accordance with the terms of the charter-party, been paid over; I apprehend, then, that would be a perfectly valid payment. Of course, if the freight had been arrested by authority of this Court, that would be a different thing. In a case recently decided at Common Law, it was held that the payment of money into this Court, under the authority of the Court, was a good payment. But, if the freight had not been arrested by authority of this Court, then the person entitled to receive the freight would have a right of action to enforce the payment thereof. A party entering into a contract is bound to fulfil the terms of that contract, unless he is stopped by a competent Court; and I am of opinion that if the amount of freight to grow due was by agreement to be paid by anticipation in the island of Cuba, the charterer was bound to pay such freight in the island of Cuba, unless stopped by legal proceedings. It ap-

pears to me that this is a payment out of Court, and that the party, by paying the freight in the island of Cuba, fulfilled the contract which he ought to have fulfilled, and which he was bound to fulfil, unless stopped by legal authority. I am therefore of opinion, that it is not competent to the bondholder now to call on the charterer to pay the freight over again. With respect to the remaining sum of 12*l.*, which is charged for brokerage in this country, I shall direct it to be brought into Court; but I shall not give costs.

Rothery, proctor for bondholder.

Bathurst for the charterer.

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The advance at Cuba was in pursuance of a contract, and acquits the charterer to that extent.

THE ROYAL ARCH, W. A. KENNEY, *Master*.

Bottomry Bond—Agreement to postpone Payment—Mortgagees—Part Owner.

A bottomry bond given by the master, with the consent of the owner, upon a British ship, lying in a British port, for a new voyage, cannot be sued upon in the High Court of Admiralty; but it is otherwise, if the ship was lying in a foreign port.

A bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred.

No particular rate of interest is essential to a bottomry bond, though, when the ordinary or a low rate of interest is taken, it raises a suspicion that sea risk was not intended, and sea risk is essential to the jurisdiction of the Court.

The consent of a managing part-owner to a bottomry bond binds his co-owners, and is strong evidence of the necessity of the bond.

A bottomry bond is entitled to priority of payment over a mortgage during the voyage for which the bond was executed; but when due, should be enforced within reasonable time, and a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, and substitutes a contract, over which the Admiralty Court, at least, has no jurisdiction.

Where the interests are distinct, separate bails should be given.

A British ship, owned at Liverpool, Nova Scotia, terminated at New York a voyage from Glasgow; being in need of repair, her master, with the consent of her managing part owner, gave a bottomry bond, payable at New York on her return to a port of discharge in the United States or British North America. After the termination of such contemplated voyage, the bondholder agreed with the same managing part owner to postpone the payment of the bond till after the conclusion of a subsequent voyage and her arrival at a port of discharge as before, the bond to remain a lien on the ship; such voyage was also performed, and on the ship reaching Liverpool, in England, in prosecution of a further voyage, she was arrested by warrant of the Court; the validity of the bond and agreement was contested by the mortgagees of three-fourths and the owner of one-fourth of the ship: Held, that the bond was originally good, but the holder could not now sue upon it in this Court, or upon the agreement.

THIS was a question of the validity of a bottomry bond and an agreement of a subsequent date to postpone payment thereof. The circumstances sufficiently appear on the face of the documents and in the judgment.

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Bottomry
bond dated
" New York,
5th February,
1856."

The bond was in the following terms :—

" United States of America.

" Know all men by these presents that I, William A. Kenney, master of the British barque Royal Arch, built in the year 1855 at Liverpool, in the province of Nova Scotia, of the burden of 430 tons British or thereabouts, owned by Archibald J. Campbell, Colin Campbell and Sylvanus Morton, merchants, residing in Liverpool aforesaid, am held and firmly bound to Mahlon Vail, of the city of New York, in the said United States, merchant, his certain attorney or attorneys, executors, administrators or assigns, in the sum of 8,000 dollars, lawful money of the said United States, to which payment well and truly to be made I bind myself, my heirs, executors, administrators and assigns firmly by these presents. Sealed with my seal and dated in said city of New York this 5th day of February, 1856.

" Whereas the said barque Royal Arch, under the command of the above-bounden William A. Kenney, departed from the port of Glasgow, in Scotland, on or about the 29th October last past, bound to the port of New York, laden with a cargo of general merchandise, the freight of which was to become due and payable on delivery at said port : And whereas, in the due prosecution of her said voyage, the said barque Royal Arch was struck by a fearful sea, which started cutwater, doing other serious damage, and also suffered other serious damage in violent gales and dangerous seas, and on or about the 21st December arrived at her destined port and earned her freight :

" And whereas, to repair the said damage, it became indispensable that she should undergo extensive repairs in order to render her seaworthy and fit to undertake a voyage to the port of Glasgow aforesaid, whither she is now bound :

" And whereas, to pay said repairs, together with port and other charges incident to his contemplated voyage, heavy expenses were unavoidably incurred : And whereas the said master had not funds sufficient to pay the expenses necessarily incurred as aforesaid ; for, after using the money collected from inward freight, a large sum remained unpaid, which he the said master could not raise on his own personal credit or that of the owners of the said barque or otherwise, except by bottomry :

" And whereas in this emergency the said William A. Kenney made application to the above-named Mahlon Vail for supply of

the funds indispensable to the repairs and expenses aforesaid, who agreed to make the said advances on condition, for his security in so doing, and for legal interest of the State of New York, from the date of these presents till paid, to take a bottomry bond upon the said vessel, her tackle, apparel and furniture, in the manner hereinafter mentioned, with this express proviso, that the said W. A. Kenney should obtain consent to his so doing of the above-named Archibald J. Campbell, acting owner of the said barque : Accordingly the said W. A. Kenney sent a telegraphic message to the said effect, and by telegraph the said Archibald J. Campbell authorized the execution of the bottomry bond required :

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“And whereas the said Mahlon Vail has accordingly made the said advances for the purposes aforesaid, amounting to the sum of 4,000 dollars lawful money as aforesaid : And the said barque is now in a fit condition to prosecute her voyage to Glasgow, and intends to put to sea with all possible dispatch :

“For the security of the said Mahlon Vail for the payment of the said sum of 4,000 dollars, and for interest thereon as aforesaid till paid, I the said William A. Kenney, master aforesaid, in consideration of the premises, and by virtue of my power and authority as master, and by express authority of Archibald J. Campbell, acting owner as aforesaid, have mortgaged, hypothecated, pledged and assigned, and by these presents do mortgage, hypothecate, pledge and assign over to the said Mahlon Vail, his executors, administrators or assigns, or to his order indorsed hereon, the said British barque Royal Arch, her tackle, apparel and furniture, boats and all appurtenances, for the security of the said Mahlon Vail in the premises, and to be put to no other use or purpose whatever until the payment of the said sum of 4,000 dollars and interest as aforesaid be justly and fully made, according to the conditions hereinafter expressed. And the condition of this obligation is such, that if the said William A. Kenney or the said Archibald J. Campbell, their heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, to the said Mahlon Vail, his certain attorney, attorneys, executors, administrators or assigns, or to his order indorsed hereon, the aforesaid sum of 4,000 dollars, with interest as aforesaid till paid, on or before the expiration of five days next after the arrival of the said barque Royal Arch in a port of discharge in the United States, or in a port of discharge in any of the British provinces of North America, to one of which the said master hereby binds himself to return in and with the said barque direct,

1857. or *viâ* a port in the West Indies, from the port of Glasgow, in
November 13. such manner that the full amount due shall be provided and
 paid in New York aforesaid, then this obligation to be void,
 otherwise to remain in full force and virtue.

“ In witness whereof, I, the said William A. Kenney, have
 signed and set my seal to three bonds, all of the same tenor and
 date, one of which being accomplished, the others to be void,
 and of no effect.

“ W. A. Kenney, Master of barque Royal Arch.
 “ Signed, sealed and delivered in the presence of.”

Agreement to
 postpone pay-
 ment dated
 29th May,
 1856.

Agreement for the extension of time of payment of bond :—
 “ Know all men by these presents, that whereas the sum of 4,000
 dollars and interest, secured by a certain bottomry bond on the
 British barque Royal Arch, which bond bears date at the city of
 New York on the 5th day of February, 1856, and is made, exe-
 cuted and delivered to Mahlon Vail, is payable on or before the
 expiration of five days next after the arrival of the said barque at
 a port of discharge in the United States, or at a port of discharge
 in any of the British provinces of North America ; and whereas
 the said barque has arrived at the port of New York as a port
 of discharge, and whereas it is mutually agreed that the time for
 the payment of the monies secured by the said bottomry bond
 shall be extended : now, therefore, this agreement witnesseth
 that it is mutually covenanted by and between the said Mahlon
 Vail, holder of the said bottomry bond, and Archibald J. Camp-
 bell, Colin Campbell and Sylvanus Morton, owners of the said
 barque, and William A. Kenney, master of the said barque, that
 the time of the payment of the monies secured by the said bot-
 tomry bond shall be extended until five days next after the
 arrival subsequent to this date of the said barque at a port of
 discharge in the United States or at a port of discharge in any
 of the British provinces in North America, excepting her present
 trip to Liverpool in Nova Scotia ; and that the said bottomry
 bond shall continue and remain a lien on the said barque for the
 repayment of the said sum of money, together with interest
 thereon, as provided in the said bottomry bond, to the time of
 payment.

“ In testimony whereof we have hereunto set our hands and
 seals, in duplicate, the 29th day of May, 1856.

“ Mahlon Vail.

“ Arch. J. Campbell, for self and
 other owners.

“ W. A. Kenney.”

This bond and agreement were opposed by the mortgagees of three-fourths of the ship owned by Archibald John Campbell and Colin Campbell, and by Sylvanus Morton the owner of the remaining fourth.

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The case was argued on the 7th of August, 1857, in sittings after Trinity Term, by—

Addams and Spinks for the bondholder ; and by

Deane and Tristram for the mortgagees and part owner.

The Court now gave judgment.

DR. LUSHINGTON :—The ship proceeded against in the case was built at Liverpool, in Nova Scotia, and owned by Archibald and Colin Campbell together with Sylvanus Morton, all merchants resident in Nova Scotia. On the 5th February, 1856, the bond sued upon was executed at New York by the master in favour of Mahlon Vail, a merchant in New York, for the sum of 4,000 dollars. The bond states that the vessel being bound from Glasgow to New York met with damage, but reached New York on the 21st December ; it then further sets forth that repairs were necessary to fit her for a voyage to Glasgow, whither she was then bound. This was an entirely new voyage, originating in New York. It is then recited that the inward freight had been applied in part payment of the expenses of repair and outfit, but that a balance was due, which the master could not raise on the credit of himself or owners. Mr. Vail agreed to make the advances by way of bottomry for the legal interest of the State of New York, on the consent of the acting owner being first obtained. The money was to be paid five days after the arrival of the vessel at the port of discharge in the United States, or British North America, whither the master was bound to proceed ; the money to be paid in New York. Such are the contents of the bond. It is contrary to usage that ordinary interest only, if such be the meaning, should be paid upon a bottomry bond. It is not usual so to advance upon a new voyage and a return voyage. These facts give rise to the conjecture that there must have been peculiar circumstances to occasion such a transaction ; but the facts are not controverted. The ship proceeded to Glasgow, and returned to New York in May, 1856, and the bond then became due. The next step in this case is, as far as I know, without precedent ; all the parties enter into an agreement to postpone the payment until after the

Judgment.

Purport of the bond.

Its peculiar and unusual provisions.

Subsequent agreement to postpone the payment of bond.

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arrival of the ship, after a new voyage, at a port of discharge in the United States or British provinces in North America, except her present trip to Liverpool in Nova Scotia, the lien to remain. The vessel then went to Liverpool in Nova Scotia, then to a port in the West Indies, then to Liverpool in Nova Scotia; then to Shediac in North America, under a new charter, thence to Liverpool in England, where she arrived on the 4th November, 1856, and was arrested by warrant from this Court whilst in that port. Looking at the agreement, it appears to me that this course of proceeding was not contemplated by this instrument; on the contrary, the arrival of the vessel in North America from the West Indies is the period when the money was to be paid. The charter at Shediac and the voyage to England are both beyond the terms of the agreement, and so is the arrest at Liverpool, in England, for the money was to be due in North America or the United States, and by the bond was to be paid at New York. What may be the effect of these circumstances is another matter, but of these facts I can find no explanation. I must now notice the proceedings in this cause. The warrant was taken out on the 4th November, 1856, and all the defaults granted. On the 14th January, an appearance was given on behalf of the Messrs. Black, as mortgagees of three-fourths, and on behalf of Sylvanus Morton as owner of one-fourth, and the bond is opposed on behalf of these two parties. Messrs. Archibald and Colin Campbell, the owners of three parts of the ship, do not appear in the cause, but it is said, that they have sold their interest in the ship. Bail to answer the action was given on the 7th March. It is possible that the grounds of opposition to this bond may not be equally available to these two opponents. The mortgagees may have a case which it is not competent to Mr. Morton, a part owner, to set up. I do not say this is so, but the mortgagees and owners have necessarily different interests, and therefore it behoves the Court to look narrowly to all the objections raised. And here, to prevent inconvenience in future cases, I deem it right to observe that I think it is very doubtful, where the interests are so distinct, whether bail should be taken in this form, and not separately. First, it is alleged that the bond was *ab initio* invalid. This objection is available to both classes of opponents. I proceed to examine the alleged facts upon which it is said that the bond was originally invalid. It is, however, necessary to bear in mind that this is not the simple case of a master executing a bottomry bond, but the case of an owner expressly authorizing the execution thereof. Though the fact of the owner authorizing the execution of the bond is admitted, it is said that such an

Separate bails ought to have been given for mortgagees and part owners, their interests being different.

Was the bond invalid *ab initio*?

It was authorized by the managing owner.

authorization was compulsory, and not voluntary. What is meant by compulsion in such a case as this? Not that the act is contrary to the wishes of him who authorizes it, for any act whereby a man binds his property may be of that character; but that an illegal and unjust compulsion has been used: whether that were so must depend on all the circumstances of the case, which I have now to consider; but I must observe, that when once it has been proved that a man has given his sanction to an act, the proof that it was done by undue compulsion must be clear and decisive; otherwise the security of ordinary transactions would be most mischievously impaired. The alleged compulsion is, that Mr. Vail having made advances without a promise that a bottomry bond should be given, resorted to the law of New York, which gave him power to detain the vessel. This argument falls to the ground if there was a promise or understanding for bottomry, which I will examine presently; but even if that were not so, in the present case the transaction has been recognized over and over again by Mr. A. Campbell. I proceed further to consider what effect is to be ascribed to the fact of the owner of a ship authorizing the execution of a bond, or signing it himself. Nothing very distinct is, so far as I know, to be found in the books, applicable to this head, and for many reasons. Bottomry bonds were usually given during voyages by the master, without the cognizance of the owner, and in cases of distress; borrowing money on bottomry, with the sanction of the owner, not being the master, for a new voyage, was of rare occurrence; so rare, indeed, that, it is difficult to find an instance, and still more difficult to find any principle of law distinctly applied by authority to such cases. This, however, is, I think, clear, that in all cases where, if the facts be truly represented, a bottomry bond may be lawfully granted, the consent of the owners must, *primâ facie*, be very stringent evidence that the facts are true. To prevent mistake, I will repeat this proposition in another form. The want of personal credit, the necessity of defraying the expenses of repairs and outfit to complete the voyage, the exigency occasioned by distress from wind, weather or accident, the sum required—all these are circumstances which justify the execution of a bottomry bond; and when the owner authorizes the execution of a bottomry bond his consent is very strong evidence of all these facts. It must be presumed that an owner would not so consent save it were to his interest so to do. Indeed, by the law as now laid down by the Judicial Committee, the consent of the owner must always be obtained where it is possible to communicate with him; this was held in a recent

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There was no
illegal com-
pulsion.

The consent of
an owner is
strong proof of
the existence
of the neces-
sity of the
bond;

and such con-
sent must now
be obtained,
where prac-
ticable.

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Can a bond be given by the master with consent of the owner for a new voyage, either in the port of her owner or in a foreign port?

The master, with consent of the owner, cannot give a bond on a British ship lying in a British port for a new voyage; at least this Court has no power to enforce such an instrument.

case (a) to be so essential that the bond was held void for the want of such communication. Formerly this rule was not so stringently applied. In *Glascott v. Lang* (b), Lord Chancellor Cottenham declared that there was no authority to support such a proposition. I must now enter into other and more intricate questions. The first of these is,—can the master, with the consent of the owner, bottomry a vessel for a new voyage, and, if so, against whom would such bond be valid, the owner only, or prior or subsequent mortgagees? Again, under what circumstances has this Court jurisdiction? This vessel belonged to Liverpool in Nova Scotia, her last voyage before the execution of this bond was from Glasgow to New York; that voyage was concluded before the bottomry bond was given, and the bond was given to defray the expense of repair and outfit necessary for a new voyage. The master states that he had a new charter, and for a new voyage. Upon this state of facts several questions arise. First, is it competent to the master of a British ship, with the consent of the owner, to give a bottomry bond for a new voyage? Secondly, could that be done if the ship had been lying at Liverpool, in Nova Scotia, the port of her owner? Thirdly, does it make any difference that the ship was lying in the port of New York, a port foreign to the owner, though at no great distance? Fourthly, what is the jurisdiction of this Court in such a case? Fifthly, must not the Court bear in mind that there are Acts of Parliament applicable to British ships, and that they must be considered as well as the law maritime? What is the principle applicable to such cases, and what authorities bear upon the question? I have opened up a very large field for investigation, but it may not be necessary to pronounce an opinion on all the points so raised, nor to examine minutely into the principles which may govern them. It appears to me that, under all ordinary circumstances, it is not competent to the master, with the consent of the owner, to grant a valid bottomry bond upon a British ship lying in a British port for a new voyage, such bond to be suable in this Court. It may be that I might put the proposition more widely, but it is sufficient for the present case to state it with these limitations. I am of opinion that a bond such as I have now described would not be valid, so as to be sued upon in the Admiralty Court, and I think so for the following reasons:—First, because such a bond would create, if valid, what may be termed a secret lien on the ship, without what the law would consider necessity, and the consequence would be that subsequent *bonâ fide* mortgagees might be injuri-

(a) *The Oriental*, 7 Moore, P. C. 408.

(b) 2 Phillips, 321.

ously affected. In early times such bonds would or might be used to cover usurious transactions; fortunately all such useless restrictions are now removed. But at the present time it is clearly the policy of the law that no liens on the ship should be created which do not appear on the face of the ship's papers. Now, whether this reasoning be good or bad, the authorities show that this Court has no jurisdiction when the bond is executed in the country of the owner before the beginning of a voyage. Contracts of bottomry made by the owners themselves in this country, at the beginning of a voyage, by the terms of which the ship is pledged as a security, cannot be enforced in the Admiralty Court against the ship. In the American Courts, probably, a wider jurisdiction is conceded (*a*). And the Admiralty Courts in our North American provinces exercise a fuller jurisdiction than the High Court of Admiralty of England. The reason seems to be that, after the Revolution of 1640 broke out, there was a great jealousy against the Ecclesiastical Courts, and this was extended to the Court of Admiralty, and so in Lord Holt's time its jurisdiction was curtailed; whereas, in our North American colonies, there were no Ecclesiastical Courts to excite any such jealousy, and the jurisdiction of the Admiralty remained on its ancient footing. The next question for consideration is, whether a British vessel, having completed a voyage to a foreign port, a new voyage being contemplated, can be bottomried for the expenses of repair or outfit with the consent of the owners, and whether such a bond can be sued upon in the Admiralty Court. I must observe that I see little difference between a bond executed by the owner himself, or by the master with the express authority of the owner. The consent of the owner having been obtained, it appears to me not necessary to inquire whether the foreign port be or be not within any distance of his place of residence. The proposition so put is the present case, divested of other objections which do not vary the proposition. I must candidly confess I know of no authority bearing directly upon the question. Upon the best consideration I can give this question, and assuming the ordinary requisites, such as want of credit, necessity, &c., to exist, I think that such a bond would be valid against the owners, and might be sued on in this Court. There appears to me a reasonable distinction between such a bond and a bond granted by the owner himself in his own country before a voyage commences; and I think so because such a bond on bottomry may be supported upon the ordinary principles applicable to bottomry bonds. Take the case of a ship bound to a

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Though in the United States and British North America the Courts of Admiralty may have a wider jurisdiction.

A British vessel can be bottomried in a foreign port for a new voyage with consent of the owner, where the usual circumstances which justify a bottomry bond exist.

(*a*) The *Draco*, 2 Sumner, p. 157.

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foreign port with no other fixed or agreed voyage, it being intended that the chance of the market shall be taken for an advantageous freight; she meets with damage, but eventually completes her outward voyage; she is then in want of repair and necessaries; the master and owner have no credit, or not sufficient credit; why should not money be in this case as validly advanced upon a new voyage? Could it be reasonably contended that money on bottomry might be advanced to bring the ship home, which no one can doubt, and yet not upon an advantageous charter? Sure I am that all the principles on which bottomry is founded would justify the advance to bring the ship home, and I cannot conceive why the same reasoning should not be equally applicable to a voyage to some other port as well as that of the owner, and more especially where the vessel was employed in a course of trade in which the voyages did not usually end at the port of the owners. I feel confident that, even if it could not be truly said that the necessities of commerce lead to this conclusion, yet that the interests of commerce, duly considered, would support the opinion I have formed. If the case which I have stated falls within the ordinary principles of bottomry, then I think it may be fairly concluded that this Court is entitled to exercise jurisdiction. Speaking, therefore, of the transaction generally, and reserving for further consideration all other objections, I am of opinion that a bond, executed according to the form of the proposition I have stated, would be a valid bond against the owners, and capable of being put in force in a Court of Admiralty. It is true that New York is not distant from Nova Scotia, but though distance may be all-important where the consent of the owner has not been obtained, yet, I repeat, that I do not think such reasoning applies to cases where such consent has been given. I now proceed to consider in detail the other objections which may be raised against the bond, or, which is a distinct head, the enforcement of it by this Court. Lord Stowell decided in the *Augusta* (a), that if money was advanced or pecuniary responsibility incurred on personal credit, such transaction could not be converted into bottomry afterwards; though it was competent to the merchant having made such advances, or having incurred such responsibility, to stop when he thought fit, and require and take a bond for subsequent advances or responsibility. Lord Stowell also said (b) that the circumstance of a vessel being by the law of the country where she was lying capable of being arrested for a debt, incurred on personal security, would not alone render a bond, granted to pre-

The present instrument was originally a valid bottomry bond.

A bottomry bond cannot be given to cover advances originally made on personal credit;

nor would the liability of the vessel to arrest, alone and without other circumstances, warrant a bond.

(a) 1 Dod. 287.

(b) Ibid. 288.

vent such arrest and detention, valid ; and he said that in most parts of the continent there existed a power of arrest for debts incurred on account of the ship, and consequently bottomry bonds might, if this were sufficient, be granted in all cases. I have not the slightest intention of departing from the two propositions of law which I have just stated, but I must observe, as indeed I took an opportunity to do in a former case (*a*), that there could hardly be a stronger necessity for the execution of a bottomry bond than that a vessel might otherwise be arrested, and either remain under detention or be sold ; and that, therefore, though in conformity with Lord Stowell's authority I should hold that a bottomry bond could not be granted solely to prevent arrest, yet I think that that, combined with other circumstances, ought to be taken into consideration. I will now endeavour to extract from these proceedings as exact a statement of the facts as I can with reference to the objections raised. The first objection raised is, that Mr. Vail was agent for the owners. This certainly was so, and by the authority of the managing owner contained in the letter to the master, dated Liverpool Nova Scotia, Nov. 29, 1855 ; but it is settled law that an agent may legally take a bottomry bond, and more especially he may do so with the sanction of the owner. Secondly, it was contended that the bond could not be sustained because the ship was new coppered ; that she had never been coppered before, and that, therefore, this was an expense not for repairs, but for improvement. The owner clearly apprehended that the coppering might, if not necessary, be expedient, and in that same letter observes, that Mr. Vail will get it done in time for a voyage to Europe at six months' credit. I am of opinion that the validity of the bond cannot in any degree be affected by the fact of the copper being an improvement upon the former condition of the vessel. The Court will never enter into the investigation whether a little more or less has been done in preparing a ship for sea, and more especially when the owner has sanctioned it, and when what was done was requisite for the particular voyage on which the ship was to proceed, as I think it is shown to have been in this case. Thirdly, with respect to the bond having been given when Mr. Vail had not actually advanced the money for the repairs, I am of opinion that, as it is shown that Mr. Vail made himself responsible for the payment of the bills, and had pledged his credit for the payment, and, in fact, paid them when due, such a circumstance cannot affect the validity of the bond. Indeed, the same circumstances have often

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An agent may take a bottomry bond.

The Court will not minutely examine what has been done in preparing the vessel for sea.

A bond given before money actually advanced is valid.

(*a*) The *Vibilia*, 1 W. Rob. 6.

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The result of the evidence shows that the advances were made not on personal security, but on the security of a bond.

No improper compulsion either on master or owners.

A low rate of interest throws suspicion on the nature of the instrument; but if sea risk is incurred, the Court has jurisdiction, whatever the rate of interest may be.

occurred in other cases, and never have been considered to create any valid objection; the utmost effect attributable to such a fact is, that it might slightly affect the amount of interest when the account was settled. Fourthly, a much more important objection, if founded in fact, is, that the transaction was not originally a bottomry transaction; that all the advances were made or responsibilities incurred before a bottomry bond was required. It is necessary to see how the evidence stands respecting this matter. Mr. Vail was not the general agent of the owners; that same letter of Nov. 29 states, "as regards an agent I have no one particular, but should give Mr. Vail the preference, as I know him, and could get many things from him I could not get from parties who were strangers to me. You had better give the business to Mr. Vail if he is in New York; still, if you can make matters equally advantageous to me, you may do as you think best, as I make you the agent for the vessel." Mr. Vail had been employed before to effect insurances on the vessel. In this state of things the owner had no right to expect that Mr. Vail would make advances, or incur any personal responsibility. [The learned Judge here referred at some length to the affidavits of Mr. Vail and of the master Kenney, and then proceeded.] Now, looking at the whole of this transaction, considering that Mr. Vail was not the general agent of the owners, that they had no right to expect credit from him, that Mr. Vail's statement is in part corroborated by Messrs. Watson, that Mr. Campbell sanctioned the execution of the bond and has admitted its validity over and over again, that nothing is opposed to this statement save the affidavit of the master, I think the probabilities, as well as the balance of the evidence, preponderate in favour of Mr. Vail's statement, and therefore I cannot pronounce against the validity of the bond, on the ground that it was not originally a bottomry transaction. Fifthly, in the course of the argument it was said that the sanction of the owners to the execution of this bond was unduly obtained by compulsion; for reasons already stated, this objection cannot be supported. Sixthly, there is a peculiarity in this bond which I think it is my duty further to notice; the stipulation for interest is confined to the legal interest allowed by the State of New York: what that legal interest is, or to what transactions it is applicable, the Court has no information; so that, so far as appears, there will be no premium at all for maritime risk, and yet it is termed in the instrument itself a bottomry bond; and unless it be a bottomry bond, and maritime risk be run, this Court has no jurisdiction to enforce it. I must admit that this part of the transaction is left in great mystery, and is not cleared up, either by

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the papers in the cause or by the arguments of counsel. Let me consider how the principles of law apply. It is quite true that the rate of interest is a mere matter of agreement, and that, subject to correction for any extortionate demand, the parties may agree upon any rate of interest which they may deem expedient; and if the risk of the seas be really incurred, it is no matter how low the rate of interest is; but it must be obvious to all that it is contrary to all probability for a merchant to advance money upon a ship, run the risk of the voyage, and yet receive, if the vessel perform her voyage in safety, no more than common interest; it is very difficult for me to credit such a state of facts. I am inclined to believe—for I have no sufficient evidence to warrant me in coming to a legal conclusion—that Mr. Vail must have had some other security, by being in possession of policies of insurance, or otherwise; indeed the letter of Mr. Campbell, bearing date March 22, 1856, written when the vessel was about to sail from Glasgow, and desiring an insurance to be made to cover Mr. Vail's debt, supports this supposition. Such evidence strongly inclines me to suppose that Mr. Vail had some security, and did not run the risk of the voyage; but no such averment even is made on the part of the opponents to the bond, and I think I am not justified in proceeding on conjectures, however probable. If the objection had been deemed tenable, it ought to have been raised in the pleadings, so that, if answerable, it might have been answered. However these facts may be, the question for the Court to determine is, whether a bond denominated a bottomry bond, with ordinary interest only, shall be deemed void by reason of there being no premium expressed. If there be a sea risk the Court has jurisdiction, whatever be the amount of the interest agreed upon; the very term "bottomry" implies sea risk. A low rate of interest, though it renders risk improbable, does not prove the contrary; indeed the whole tenor of the bond is in favour of sea risk being intended. The true meaning of the bond must be extracted from the bond itself, with reference, no doubt, to surrounding circumstances; but, save in case of fraud, I should hesitate in receiving evidence to show that the contract was different from that expressed in the instrument; and neither this Court nor those of common law have looked with great nicety at the wording of such instruments(a). After much consideration I am of opinion that I shall not be justified, on account of the low rate of interest alone, in holding a bond denominated a bottomry bond to be otherwise than it describes itself; and, therefore, on this ground I cannot

(a) *The Nelson*, 1 Hagg. Adm. 176; *Simonds v. Hodgson*, 3 B. & Ad. 58.

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Consent of the
managing
owner binds
the other part-
owners.

The bond was
originally valid,
and, during the
contemplated
voyage, would
be entitled to
priority as
against a mort-
gagee.

The agreement
to postpone the
payment of the
bond

pronounce against the bond. I must add, that this is a very important consideration, for, if there be really no sea risk incurred, this Court has no jurisdiction (*a*). For all these reasons I have come finally to the conclusion that the bond was originally a valid bottomry bond. Seventhly, it is not necessary for me to say whether the bond would or would not have been valid without the consent of Mr. Campbell, the owner of a moiety, and also the managing owner; but, if such consent were requisite, I think that the consent of Mr. Campbell was sufficient to bind the other part-owners; it appears to me that, in the matter of sanctioning a bottomry bond, which in its nature depends upon the distress of the vessel and the want of personal credit, the managing owner must, from the necessity of the case, bind his co-owners. I think that this, as a general proposition, is true, because the exigencies of the vessel will not allow of time to consult co-owners; but I think it more especially true in the present case, where it is left wholly uncertain what the interest of Mr. Morton was at that time in the vessel. The bond therefore being originally valid, there cannot, I think, be any doubt, that *during the voyage for which it was executed*, it would be entitled to priority of payment against a mortgagee. Where money is advanced on mortgage of a ship, the mortgagee must always be aware that he takes his security subject to all legal liens, and if he suffers therefrom, his only remedy must be against the owners. I regret to think that the most peculiar and difficult part of this case remains behind, and I now proceed to the consideration of the postponement of the payment of the bond, and the legal effect of such postponement. It appears that this vessel proceeded from New York to Glasgow, and that she returned to New York in May, 1856, where, according to the terms of the bond, it became payable. On May 29, 1856, the parties enter into a new agreement, in which, after reciting the contents of the bond, they stipulate that the bottomry bond shall continue a lien on the barque, and that the time for payment shall be extended till five days after the arrival of the barque at a port of discharge in the United States or in any of the British provinces in North America, excepting her present trip to Liverpool in Nova Scotia, and then upon any voyage to and in the United States or in British North America—a period, of course, of very indefinite duration. Before proceeding to the further history of the vessel, let us see what took place with respect to the mortgage. It appears from the affidavit of Mr. Black, one of the mortgagees, that the Messrs. Campbell were indebted to his firm 2,289*l.* 8*s.* 7*d.* on

(a) *The Atlas*, 2 Hagg. Adm. 52.

June 4, 1856; that Colin Campbell was indebted 136*l.* 8*s.* 11*d.*; that Archibald Campbell mortgaged his 32-64th shares in the Royal Arch, to secure the payment of 2,500*l.* currency; and Colin Campbell his 16-64th shares to secure 480*l.* This mortgage was duly registered according to the Act of Parliament, and Mr. Black swears—and I see no reason to doubt the truth of his statement—that he was utterly ignorant at that time of the bottomry bond in question. Assuming for a moment that the agreement of 29th May might be a binding agreement upon the owners of the vessel, a very important question arises for the decision of the Court, whether it can prevail against a mortgage? It is first necessary, however, to consider the legality of the agreement and its general effect in law. The agreement postpones the payment till the completion of another voyage. The maritime risk contemplated by the bond to render the transaction bottomry was and is wholly at an end. Can it be contended that any maritime risk was or could be incurred for the voyage subsequent to the agreement, though the same interest continued? That a maritime risk continued is neither stated nor to be inferred from anything appearing in these proceedings. But, supposing it had been so intended, all the ingredients necessary to constitute a valid bottomry are wanting; there is no proof of distress, want of necessities or of personal credit. A bottomry bond cannot be granted for a debt incurred on a former voyage, and on the same principle that a bottomry bond cannot be given for a debt incurred during the same voyage on personal credit (a). The agreement is not the creation of a new bottomry bond, but the postponement of payment on an old bond. Does the security on the ship remain? The present suit is founded not on the old bottomry bond alone, but on the bond and the agreement. Is it lawful so to postpone the payment and to continue the security? Let us carefully consider this proposition, bearing in mind that possibly there may be a distinction with respect to the parties' interest as owners or mortgagees. It must be remembered, that a postponement by agreement is a voluntary proceeding on the part of the bondholder. It is not a delay in requiring payment from any difficulty in proceeding to recover against the ship; it is a new personal contract between the parties, not founded on the necessities of the ship—it may be a good personal contract. The forbearing to arrest the ship may be a good consideration for the contract, and entitle the party to recover at common law. If it be a personal contract of this description, it cannot constitute bottomry. If the debt was con-

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was a personal contract between the parties not founded on the necessities of the ship.

(a) *The Hero*, 2 Dods. 147.

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The policy of the maritime law is against the continuance of secret liens.

sidered as absolute, and not contingent upon risk of the vessel, it is neither bottomry nor mortgage. If the contract gives a right to sue in an action, then this Court cannot entertain the suit, for I take it to be settled law that in bottomry the owners cannot be personally responsible. The policy of the law, not only of England, but necessarily of all maritime countries, must be, that the purchaser or mortgagee of a vessel shall, as far as is practicable, know how far he can safely purchase or lend his money. If he purchases it is possible that certain liens may attach upon the ship, as wages,—salvage claims,—and against these he requires a warranty. If the ship is on a voyage when bought the purchaser must take his chance of the liens which may be lawfully created; but I apprehend that no one purchases or lends money on mortgage on a ship with any conception that a bottomry bond due on a former voyage is outstanding; the continued existence of such a bond is contrary to all ordinary usage. The provisions of our own law are framed especially to guard against latent claims; they are to be found in the Merchant Shipping Act (a), “Transfer and Mortgage,” in Part II. By sect. 69, mortgagees are entitled to priority according to their date of entry in the register-books. These considerations tend to show the great inconvenience and injustice which might arise from the postponement of the payment of a lien. In the case of seamen’s wages there is a time limited by law. As to how far laches would deprive a bottomry bondholder of his right to sue on the bond, there is no case in these Courts, to my knowledge, which applies with any stringency. There is the case of the *Jacob* (b). That was a suit on a bottomry bond, and the question was, whether freight, earned on a voyage subsequent to that for which the bond was given, was liable. Lord Stowell held that, under the circumstances, it was liable, but expressly guarded himself from laying down any general rule for cases where any third party might have become interested in the freight of the subsequent voyage. So far the general *dictum* applies to the mortgagees in this case. In the *Rebecca* (c), the circumstances were different: it was an attempt to sue on a bottomry bond after a war; but Lord Stowell said that, in questions of bottomry, the Court is bound to expect particular vigilance; that they should be pursued with active diligence, so that the Court may have an opportunity of considering them in their recent origin. I may also refer to *Packard v. Sloop Louisa* (d); *Leland v. Ship Medora* (e); *Blaine v. Ship Charles Carter* (f);

(a) 17 & 18 Vict. c. 104.

(b) 4 C. Rob. 245.

(c) 5 C. Rob. 102.

(d) 2 Woodbury & Minot, 48.

(e) Ibid. 92.

(f) 4 Cranch, Reports of Cases in Supreme Court, U.S.A., 328.

Nestor (a). The effect of these cases is to show that a bottomry bond ought to be enforced within reasonable time, it is a lien on the vessel only for a reasonable time : and if not enforced within such time creditors or other claimants may be entitled to precedence. I apprehend that this Court would be very reluctant to entertain a claim of salvage against a ship purchased without notice, if the salvors had voluntarily postponed their claim, there having been full opportunity to enforce it. But I cannot consider the present case as a suit upon a bottomry bond merely delayed ; it is not a matter of mere lapse of time ; it is a postponement by agreement, and I think that, supposing that agreement to be valid, I have not jurisdiction to enforce it. If I were to take cognizance of this case, I think I should enforce not the original bond, but the agreement, and that I cannot do. As regards the mortgagees, it appears to me that, to defeat the mortgage by directing this bond to be paid in preference, would be injustice and a clear avoidance of the policy of the law with respect to British ships. It is possible that Mr. Sylvanus Morton, as a co-owner, might stand in a different condition ; the bond would, I think, if originally valid, have bound his interest in the ship ; but it by no means follows, that he would be bound by the subsequent agreement. A part owner may mortgage his own shares, but he cannot mortgage those of his co-owner without his consent. This agreement is the creation of a mortgage ; the want of power in the Court to enforce the agreement, the want of jurisdiction, equally applies to Mr. Morton. It is proper I should add that this ship was not arrested even at the time specified in the agreement, for she is allowed to make subsequent voyages. I do not deem it necessary to enter further on the possible effect of this further delay. I must declare that this Court cannot enforce the bond and agreement in question, and dismiss the suit. I give no costs, because it is a case *primæ impressionis*, and I know of no case bearing strictly on the present, though some authorities may be extracted from those cited.

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And bottomry bonds must be enforced within reasonable time at the risk of losing their priority.

In that case the agreement may be a valid personal contract, but cannot be enforced in this Court.

Suit dismissed, but without costs.

Rothery, proctor for the bondholder.

Tebbs for the mortgagees and part-owner.

(a) 1 Sumner, 73.



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THE SPIRIT OF THE AGE.

Salvage by Steam Vessel—Apportionment between Owner and Crew.

Steam vessels are important agents in salvage services, and their owners will be adequately rewarded. Where a steam-tug had been in considerable danger in performing a salvage service; held, that, after deducting a sum for repairs and detention, the owner was not entitled to more than a moiety of the remainder of the whole sum awarded for the salvage service; the other moiety to the master and crew.

THIS was an application for the apportionment of a sum decreed for salvage service by the Court in February, 1857; the judge then pronounced 3,500*l.* to be due to the owner, the master, and the crew of the steam-tug *Secret*, for important salvage service rendered to the vessel *Spirit of the Age*. Such sum was paid to the owner of the steam-tug, who had allotted to himself, for the service of the vessel, 2,731*l.* 5*s.*, and had divided among the master and crew 768*l.* 15*s.*; to the master, 300*l.*; chief engineer, 93*l.* 15*s.*; to the mate, second mate, stoker and second engineer, 62*l.* 10*s.* each; to a boy and to a fireman, 31*l.* 5*s.* each. The second engineer objected to the tender of 62*l.* 10*s.* as his share, and applied to the Court to re-apportion the salvage.

Deane, for the second engineer, admitted, that in such services the steam vessel herself is properly said to be a principal salvor, but contended, that, in this case, the crew were in considerable danger, and that as far as precedent went, he could find no case in which the Court, as between the owners and crew, had awarded more than a moiety to the owners of the salving vessel.

Bayford, for the owner, submitted that the value of the steam-tug was 6,000*l.*; that, if the persons on board were in danger, the vessel herself was in still greater danger; that she did in fact receive considerable damage; that she was under repair for some time at a cost of nearly 500*l.*, during which time the owners lost her services and were paying the crew their wages.

Judgment.

DR. LUSHINGTON:—We all know that formerly claims of owners of vessels to participate in salvages did not receive very

favourable attention from the judges who preceded me in this chair; but since then things are much changed; steamers are able to render important salvage services, in which the ship herself is the chief agent. I have therefore departed from the former practice, and have given adequate rewards to the owners of such vessels. I regret that this application is made so late; it is more convenient that such applications should be made while the circumstances of the case are fresh in the mind of the Court; as it is, I have been obliged to look through the papers again, and it certainly appears that the steamer, and those on board her, were exposed to great risk. A party dissatisfied with the tender made in apportionment of salvage is not precluded from coming here at any reasonable time after salvage decreed; and the question of time cannot be pressed against a person in the present applicant's class of life. If the damage to the steamer is to be taken at 500*l.*, the owner was warranted in deducting that before he began to distribute, and also a reasonable sum for loss of her services while she was repairing. On these two heads the owner might first have deducted 800*l.*, but his apportionment of the remainder is wholly inequitable; after such deductions the Court has never awarded more than a moiety to the owners. I allot one-half of the remainder to the owner, and the other half between the master and crew in the proportions originally adopted; and I give the costs of this motion.

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Edwards, proctor for the seaman.

Rothery for the owner of the *Secret*.



THE MARTIN LUTHER, T. J. GORDON, *Master*.

Salvage—Steamer.

The mail steam-ship *Tagus*, on her voyage from Gibraltar to Southampton, fell in with a large passenger ship dismasted and in considerable peril; she towed her into Plymouth Sound. On a value of 12,000*l.* the Court awarded a total of 1,500*l.*, allotting 600*l.* to the owners of the *Tagus*, 400*l.* to her master, and the remaining 500*l.* among the crew.

THIS was an action brought by the steam-ship *Tagus* to procure remuneration for salvage services rendered to the ship *Martin Luther*, about twenty miles to the north of Ushant, on the 14th of April, 1857. It appeared that the *Tagus*, in the prosecution of her voyage from Gibraltar to Southampton with

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her Majesty's mails and sixty-two passengers, observed the Martin Luther dismasted. On reaching her the salvors ascertained that she had left Liverpool for Quebec with 500 passengers, and that she had drifted upwards of 100 miles out of her proper course. She was rolling frightfully, had lost nearly all her sails, only one mast was left standing, and she had signals of distress hoisted. Seeing her perilous condition they manned the life-boat and proceeded to her aid, but in consequence of the rough state of the weather the life-boat's crew were unable to board her. By means of the life-boat, two hawsers belonging to the Martin Luther were passed to the Tagus and made fast on board, and the steamer proceeded to tow her towards Plymouth Harbour. After some difficulty, owing to bad steering on board the Martin Luther, they arrived in Plymouth Sound on the 16th April. The salvors concluded their statement by saying that, owing to the disastrous state in which the ship was, had it not been for their timely assistance she must have gone on shore and become a total wreck. The owners did not deny that a salvage service had been rendered, but contended that a moderate reward would be sufficient for the services. The value of the property salvaged was 12,000*l*.

The *Admiralty Advocate* (Dr. Phillimore) and *Deane* were heard for the salvors.

Addams and *Twiss* for the owners.

Judgment.
Sole question
is as to the
amount of sal-
vage.

Disabled state
and perilous
position of the
Martin Luther.

DR. LUSHINGTON:—The sole question for the decision of the Court is, what amount of salvage should be decreed to the owners, master and crew of the steam-ship, the Tagus, for certain services rendered by them to the ship proceeded against—the Martin Luther. These services are in part admitted, but it always happens, on these occasions, that the statement of the salvors goes to a greater extent than the owners are inclined to admit to be true. Of course the first consideration is, whether the ship to which the services were rendered was or was not either in a state of immediate peril at the time the services were rendered, or in that condition that peril was likely to ensue unless those services were performed. The Martin Luther was a ship of large tonnage—nearly 1,200 tons—and was proceeding from the port of Liverpool to a port in America, having on board no less than 500 passengers. She had left the port of Liverpool only two or three days, when she met with such tempestuous weather that it amounted to a perfect hurricane from W.N.W., and then the protest sets forth, in great detail, the consequences

which ensued from the state of the weather. I need not state all these consequences in detail, but may sum them up in a few words. They had had the misfortune to lose the boatswain and four of the crew, and almost every mast they had was carried away. Under these circumstances all they could do was to make the best attempt they could to get to a place of safety. As for the prosecution of the voyage, it was of course absurd to suppose it could be attempted. Being in this condition, and the weather having moderated, they were fallen in with by the mail steamer *Tagus*. The salvors say that she was drifting to leeward, that the wind and the tide were driving her to leeward, and that she was in a state of great peril. Whatever may have been the actual state of circumstances at this moment, it is impossible to deny that any ship, placed in the position in which this ship was, would be entirely at the mercy of the wind and waves. I think it is proved in this case that this ship was drifting to leeward, and that she was in immediate peril at that time, which was enhanced by the fact, that all the life-boats had been carried away by the hurricane. This being the condition of the ship, the next question is, what were the services rendered, who rendered the services, and in what capacity were the persons at the time they performed these services? The steam-ship was in the service of the Peninsular and Oriental Steam Navigation Company, carrying her Majesty's mails, and having on board sixty-two passengers. She was proceeding to the port of Southampton, and I need hardly say, that when a ship in this peculiar occupation is induced to incur any delay in carrying her Majesty's mails, and landing her passengers at their destination, she ought never so to do unless the necessity is imminent to require such services; because it is of the greatest possible importance to the public to land the mails with the greatest expedition, and it is due to the passengers that they should not be needlessly delayed in the prosecution of the voyage. Now, seeing the position the ship was in, and seeing the signals hoisted, intimating her distress—and, in point of fact, the difficulty and danger of the ship was apparent from the position she was in—a ship of these dimensions with only one mast standing, and only one sail left—they sent a life-boat to her assistance, and it is proved to my satisfaction that there was very considerable difficulty in the service the life-boat performed, because it is not denied, on the present occasion, that one compartment of the life-boat was crushed. They take her in tow, and she is conducted to Plymouth in twenty-four hours. Now, a master who commands a ship like the *Tagus*, incurs very great responsibility when he takes upon himself to employ his

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The service was performed by a steamer carrying mails and passengers.

Arduous service attempted by her life-boat.

Responsibility of the master in such a case.

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steam vessels
must be en-
couraged.

ship—laden with passengers and mails—in any service than that in which she is engaged. The value of the property is 12,000*l*. I think that the sum which I ought to give, as near as I can form a judgment upon it, with reference to all the facts and circumstances, is 1,500*l*. I shall allot 600*l*. to the owners, and for this reason—because their property was engaged; and also for another and obvious reason, that unless I encourage the owners of steamers that are able to perform the most efficient services, it may follow, and this has often been suggested to the Court, that orders will be given to the masters of their ships that, except in cases of saving life, they shall never engage in any salvage service at all. I shall give 400*l*. to the master, for I think that the master, on all these occasions, is a person that ought to be greatly encouraged; because it is upon him that entirely rests the whole responsibility of employing the ship. He has no right to deviate from the usual employment of the ship, except in strong cases of urgent necessity; and if he deviates from that employment without sufficient cause, he is liable, and most justly liable, to be severely blamed. I shall allot to the master 400*l*., and the remaining 500*l*. I shall give to be divided amongst the crew.

Middleton, proctor for the salvors.

F. Clarkson for the *Martin Luther*.

THE GEORGE DEAN.

Salvage—Derelict—Moiety awarded.

Rule for estimating value where the salvage concluded at one port and the cargo was transhipped and brought to another and there sold; the salvors are only entitled to salvage on the value at the port where their services concluded.

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THIS was a cause of derelict salvage promoted by the owners, master and crew of the *John Paul* against the vessel *George Dean*, her cargo and freight. On 22nd March, 1857, the *John Paul*, being on a voyage to the Mauritius, fell in with the *George Dean*, in latitude 46° 25' north, longitude 15° 58' west, dismasted and a derelict. She put some of her own crew on board and towed her till 2nd April, when, being a few miles off Lisbon harbour, both vessels were towed into that harbour by a

steamer. The cargo of the George Dean, palm oil, was afterwards transhipped and brought to London and there sold. The action was entered in 4,000*l*.

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A proctor appeared for the owners of the cargo, and gave bail in that amount as far as regarded the cargo. An appearance was also given for the ship which was of small value. The cargo was asserted to be unsaleable in Lisbon, and the question was, whether salvage was due on the value at Lisbon or in London.

DR. LUSHINGTON :—I am of opinion that the salvors are entitled to salvage only on the value at Lisbon. I hope to be able to settle this question at once by taking some agreed value on which to decree salvage. If this cannot be done, and a reference to the Registrar and Merchants becomes necessary, I imagine the strict method to arrive at the value of the cargo at Lisbon would be, not on any assertion of its being unsaleable there, but by putting it at 7*l*. and 8*l*. per cent. less than the proceeds of its sale in London, deducting freight and other charges for the voyage from Lisbon to London, but allowing a *pro ratâ* freight as far as Lisbon. Judgment.

After some discussion at the bar, Dr. LUSHINGTON took the value of ship, cargo and freight to be 4,500*l*.; directed that the value of ship and freight should be deducted from that to ascertain what the owners of the cargo were liable for, and decreed a moiety of the 4,500*l*. to the salvors, as the salvage service was of a highly meritorious nature.

On December 18th, the proctor for the salvors prayed the Judge to apportion 1,950*l*., being the balance of the sum of 2,250*l*., the amount of salvage pronounced due to the owner, master and crew of the John Paul, after deducting 300*l*., the expenses incurred by the owners of the said ship.

DR. LUSHINGTON allotted 800*l*. to the owner, 400*l*. to the master, and 750*l*. among the crew, in proportion to their wages, apprentices' wages to be taken at two-thirds of those of able seamen.

Orme, proctor for the salvors.

F. Clarkson for the owners of cargo.

Tebbs for the owners of the ship.

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December 8.THE OLIVE, THOMAS RICKARD, *Master*.*Master's Suit for Wages—17 & 18 Vict. c. 104, s. 191—Practice—Expenses and Compensation for Loss of Time as Witness.*

In estimating the allowance and compensation for loss of time in the case of a seaman detained to give evidence, the rate of wages is a fair criterion. A master has in all respects the same privileges as a common seaman in a suit for wages under the Merchant Shipping Act, and is, *prima facie*, a necessary witness in his own suit.

THIS cause came before the Court on objection to certain items of a bill of costs taxed by the Registrar. It was originally a suit for wages brought by Mr. Thomas Rickard, the master of the ship *Olive*, who, after some steps had been taken, accepted a tender of 244*l.* 8*s.* 3*d.*, being 76*l.* 9*s.* 1*d.* less than the sum claimed, together with costs. The Registrar reported the proctor's bill of costs at 78*l.* 19*s.* 8*d.*, and the sums now objected to were wages of Mr. Thomas Rickard, from 31st December, 1856, to 28th February, 1857, when the tender was made, during which time he was detained in this country to give evidence on the summary petition in the cause; two months, at 10*l.* per month, and board wages, during such time, at 15*s.* per week. The objection was founded on the suggestion that Thomas Rickard was not detained in this country solely to give evidence on the summary petition in this cause, but was necessarily and principally, if not solely, detained to give evidence also on his own behalf in an action brought against him on a bill of exchange that came on for trial at the Gloucester Spring Assizes; and that, at all events, the allowance of 20*l.* for wages was improper, and ought to have been disallowed in this cause.

Addams, in objection to the Registrar's report.

Twiss, *contra*.

DR. LUSHINGTON inquired whether the practice of the Registrar was to allow ordinary witnesses compensation for loss of time as well as for subsistence.

The Registrar said that such was the practice, and that in the *Chimera* the Court had said, that wages would be the proper rate of compensation for seamen.

Judgment.

DR. LUSHINGTON:—The question for the Court does not appear to be one as to amount, but whether any sum of money

ought to have been allowed to the master in this case by way of board wages, and as compensation for wages that might have been earned during the period of his detention. The Court is not inclined to depart from the rules hitherto acted upon by this Court, to follow rules laid down elsewhere. There may be different rules in other Courts, and there may be good reasons for them in those Courts. The only question the Court has now to consider is, whether the sums charged on account of maintenance and compensation fall within the ordinary practice of the Court. I cannot doubt that the master has, generally speaking, the same rights and privileges, in suits for wages in this Court, as ordinary seamen have; the 191st section of the Merchant Shipping Act is express on the point; and a seaman suing in this Court for his wages, being a necessary witness, is entitled to such costs and compensation. Whether a person is a necessary witness must always depend on the circumstances of each case; on the present occasion, where the master brings a suit for his own wages, he is *primâ facie* a necessary witness. As to the facts of this case, the master entered his suit, bail was given and a summary petition admitted; a tender was then made, less than the amount claimed, together with costs, and was ultimately accepted by the master. I am of opinion that the master was just as necessary a witness, whether the sum originally claimed was larger than that accepted or not. In the course of the proceedings it is alleged that he was not a necessary witness, and that he did not, in fact, stop for this purpose of giving evidence in this case, but for another purpose altogether. Now that may be true, but his remaining at Gloucester for the Assizes I hold to be perfectly immaterial. The question is, not whether he was a material witness in two cases, but whether he was so in one. I am of opinion he was so in the present case, and confirm the Registrar's report with costs.

Thomas, proctor for the mortgagee of the ship.

F. Clarkson for the master.

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The Court will adhere to its ordinary practice.

The master has now all the privileges of an ordinary seaman in a suit for wages,

and is *primâ facie* a necessary witness. Facts of the case.

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December 8.THE CHANCE, ROBINSON, *Master*.*Collision—Practice—Libel given in and Witnesses examined de bene esse—No Opportunity for Cross-Examination.*

The surrogate had admitted A.'s libel in a cause of collision, and allowed witnesses to be examined thereon *de bene esse*, on affidavit that the ship was about to sail for Syria. She sailed in fact, and no opportunity was given to cross-examine. The Court allowed B.'s allegation in reply to such libel to be brought in and witnesses to be examined and cross-examined thereon, but ordered that the cause should not be heard till A. should have submitted the witnesses on his libel for cross-examination.

THIS was a question of practice arising in a cause of damage promoted by the brig Meldon against the owners of the brig Chance. The collision occurred on the 9th October, and both vessels put into Ramsgate harbour to repair. The Chance remained there till 19th October, when she sailed for foreign parts. On the 24th October, a monition by the proctor of the Meldon was served on the owners of the Chance, but as owing to the absence of their crew and master from England, they were unable to instruct a proctor as to their defence, they took no immediate steps. On 31st October, on an affidavit of one of the clerks of the proctor for the Meldon as to the necessity of that ship sailing, the surrogate permitted a libel to be brought in on behalf of the Meldon, and witnesses to be examined thereon *de bene esse*. Such witnesses were produced on the 3rd and 5th November. On the 6th November, the proctor instructed for the Chance, which had by that time returned to England, gave the proctor for the Meldon notice of his intention to defend the action, and to enter a cross-action. In reply to this, he was informed that the witnesses were examined on the libel given in on behalf of the Meldon, and that she had sailed for Syria. It appeared that the proctor of the Meldon was misinstructed on this point, as the Meldon did not actually leave Ramsgate till the 10th November.

The proctor for the Chance now applied to the Court for leave to bring in an allegation, and to examine witnesses thereon *de bene esse*, without the proctor for the Meldon being permitted to see the allegation or cross-examine the witnesses, or any of them, until after the witnesses on his libel should have been cross-examined by the proctors for the Chance.

Deane moved the Court to the above effect, and submitted, that if the Court was not inclined to adopt that exact form of

proceeding, it might permit the libel on behalf of the Chance to be examined to in chief, and hear the cause on the examination in chief on either side.

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Addams, contrà.

DR. LUSHINGTON:—It appears to the Court that matters in Judgment. this case have got into considerable confusion, from which it may be no easy matter to extricate them. In cases of collision, where one of the vessels is to sail immediately, the owners are naturally anxious to give in their plea and examine witnesses, and the Court is equally anxious to give them every fair facility so to do, though sometimes there is a difficulty from the other party not being prepared with necessary facts to enable them to cross-examine the witnesses. By mistake, I presume, in this case very erroneous statements have been made to the proctor and the surrogate. The question is, what is the best course under the present circumstances? I do not intend to put myself at the disadvantage of hearing this cause without cross-examination; the course I shall pursue will be, to admit the allegation on behalf of the Chance, and to allow witnesses to be examined and cross-examined upon it; but I shall make an order that the cause shall not be heard till the proctor for the Meldon has submitted his witnesses for cross-examination.

Stokes, proctor for the Chance.

F. Clarkson for the Meldon.

THE NEPTUNUS, JACOB GREFF, *Master.*

Collision—Practice—Plea and Proof—Extra-articulate Evidence.

On application to strike out extra-articulate evidence on an allegation in a collision cause before the papers were printed and put into the hands of the Trinity Masters:

Held, that parties have a right to require extra-articulate evidence to be struck out either at the hearing or previously, and that in this respect there is a wide difference between a proceeding by act on petition and affidavit and a proceeding by plea and proof.

THIS was a question of practice arising from the evidence taken on an allegation in a cause of collision. The articles of the allegation on which such evidence was taken were as follows:—

Fifthly, that in part reply to the matters pleaded in the second

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article of the said libel, the party proponent alleges and propounds that no other signal light than that at the mast-head of the *Genova* was at any time exhibited on board that vessel between the time of her being first seen by those on board the *Neptunus* and the time of her being in collision, either with the *Neptunus* as hereinbefore pleaded, or the steam-ship *Constitution* as hereinafter pleaded.

Sixthly, that in part reply to the matters pleaded in the third article of the said libel, the party proponent alleges and propounds that the wind was not blowing strong from east by north, and that the *Genova* was making more than about five knots an hour. That a strict and vigilant look-out was not, and could not have been kept on board the *Genova*, that the *Neptunus* was not, at any time after she was first seen at the distance of two miles by those on board the *Genova* previous to the collision, on the port bow of the *Genova*; that although there was no fixed light on board the *Neptunus*, there was a lanthorn containing a light in readiness to be exhibited to approaching vessels; that the *Neptunus* was running dead before the wind under a press of canvass; that the *Neptunus* was never at any time standing towards the *Genova's* port bow, and, moreover, did not run into the *Genova's* port bow, either stem on or otherwise; and, with reference to the damage alleged to have been sustained by the *Genova*, the party proponent alleges and propounds that about an hour after the *Genova* had been so as aforesaid in collision with the *Neptunus*, the port bow of the *Genova* came into violent collision with the port bow of the *Constitution*, whereby the port bow of the *Genova* was stove in, and she sustained other very considerable damage; and that it was not until after the said second collision that the *Genova* was found to be making water, or that her pumps were set to work.

On these articles the second officer and quartermaster of the *Constitution* were examined by commission at Cork. In their account of the collision between the *Constitution* and *Genova*, the following statement was introduced: "But while we were lying alongside, the captain, who was so much intoxicated that he could not get from our chains on to our rail without my assistance, came on board, &c. and began to cry . . . As soon as we struck, the captain and four of his crew came on board; he was so drunk that he could not say anything at first."

The case was intended to be heard with the assistance of Trinity Masters, and the present application was made to the

Court to have the above descriptions of the master's drunkenness struck out of the depositions before the papers were printed, so that such imputation on him, being extra-articulate, and not suggested in the plea, might not prejudice the minds of the Trinity Masters as to the rest of the case.

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Deane and Twiss in support of the application.

Bayford and Spinks *contra*.

DR. LUSHINGTON:—There is a very wide difference as regards such a question as this between a proceeding by plea and proof, as the present, and by act on petition and affidavit. In former times the Court has repeatedly stated, though perhaps without considering the Trinity Masters, that it would be reluctant to entertain objections to irrelevant matter in act on petition or affidavit, because the Court could trust to itself to get rid of any prejudicial impression likely to be produced, while multiplying objections of such a nature leads to expense and delay, which it is the very object of the form of the proceeding by act on petition to avoid. But in proceeding by plea and proof, the question is totally different, it is a matter of right to either party to object to extra-articulate evidence, either at the hearing or previously. Are the parts of the depositions desired to be struck out extra-articulate or not? The second collision itself would have been an issue altogether irrelevant if certain averments had not been made in the libel as to the origin of the damage which the Genova received on the night in question. On the articles of the allegation counterpleading these averments of the libel, two witnesses have sworn to matter not pleaded, and wholly irrelevant to the issue between the Neptunus and the Genova. I cannot agree with Dr. Spinks, that such statements are of small importance; I think they are calculated to make an impression on the mind of the Trinity Masters, and I am not so clear that I could effectually counteract that impression by remarks I might make at the hearing. Those sentences of the depositions must not be printed.

Judgment.
Distinction between "plea and proof" and "act on petition."

In "plea and proof" an objection to extra-articulate evidence is a matter of right.

Deacon, proctor for the Genova.

Rothery for the Neptunus.

1857.

December 14.**In the Privy Council.*****Present***—The Right Hon. T. PEMBERTON LEIGH.

The Right Hon. Sir JOHN DODSON.

The Right Hon. Sir WILLIAM MAULE.

THE LA PLATA.**ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.*****Collision—Vessels in tow—Narrow Channel—17 & 18 Vict.
c. 104, s. 297.***

The rule for navigating a river or narrow channel laid down in the 297th section of the Merchant Shipping Act is applicable to vessels in tow.

Semble, that in a narrow channel small vessels should avoid large ones in time.

THIS was an appeal from a sentence of the High Court of Admiralty of England (*a*). The facts of the case appear fully in the judgment below.

*J. Wilde, Q.C., and Robinson for the Appellants.**Addams and Twiss for the Respondents.*Their Lordships were assisted by Mr. *John Macdonald* and Mr. *James Brown*, Masters in the Royal Navy.**Judgment.****Facts of the case.**

The Right Hon. Sir W. MAULE:—This was originally a suit in the High Court of Admiralty, in which the owners of the brig *Hélène* sought to recover compensation from the owners of the screw-steamer the *La Plata* for the damages sustained by a collision which took place off Blackwall, in the River Thames. It appears that each of the vessels, at the time of the accident, was being towed by a steam-tug, the brig up the river, the steamer down. It is alleged on behalf of the owners of the *Hélène* that the conduct of those who had the management of the *La Plata* was such as to produce, by their negligence in not porting or not porting in time, this collision. On the part of the Appellants it is insisted that the Court below was mistaken in the inference which it drew from the evidence, and that the true inference is, that the *La Plata* is not shown by the evidence before the Court to have been guilty of any negligence. If she

(a) Vide supra, p. 220.

has not been guilty of negligence, then, whether the *Hélène* was guilty of negligence or not, and how it was that the collision and damage took place, will not be material. The Court below thought that there was negligence on the part of the *La Plata*, and condemned her in the damages. But it appears to their Lordships that those who managed the *La Plata* are not shown to have been guilty of any wrong navigation, or any default or negligence which occasioned this accident. The collision happened just about the time of high water, when it could not probably be told, as to any particular part of the river, which way the tide was going or would be going in the course of a few minutes, and it might be a question whether it was or was not an accident for which nobody was to blame. If that be so, that nobody is to blame, there is an end of the case. That the *La Plata* is not to blame is a matter depending upon nautical considerations, and we have had the great advantage on the present occasion of the assistance of gentlemen of nautical experience, who have tendered to the Court their valuable advice. The opinion of these gentlemen, as expressed by one of them, is to this effect:—"The witnesses on the part of the brig agree in stating that she was about mid-channel. The evidence on the other side goes clearly to prove that she was on the south side of the fairway. We believe the latter to be the case. The *La Plata* did all she could do. Her helm had been put to port to clear another vessel, and it was never altered till after the collision. The *La Plata*, from her length, would not answer her helm so quick as the *Hélène*, but she was on her right side of the river, and was as close over as she could get without fouling the craft at anchor on the south shore. The *Hélène* being a small vessel, and in tow of a tug, would answer her helm very quickly. She was not on her proper side of the fairway. Had a good look-out been kept, they must have seen so large a ship as the *La Plata* coming down, and, knowing the locality, the *Hélène* could have steered over to the north side of the fairway. It appears there was little or no wind, and very little tide. We are of opinion that it is the duty of small ships to get out of the way of large ones in time. The *Hélène* should have done all in her power to get out of the way; she did not do so, and the rule of the road should be strictly adhered to in navigating a river whenever it is safe and practicable." That is the opinion which has been expressed by these gentlemen, and the reasons they have given appear to their Lordships to be perfectly satisfactory. With respect to some minor points that were made as to the construction of the Act of Parliament and some other considerations of that description, their Lordships do not deem it necessary to

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Opinion of
nautical as-
sessors.

Vessels in tow
are bound to
observe the law
of the road.

Small vessels
ought to avoid
large ones in
time.

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La Plata not
proved to have
been in fault.

Judgment re-
versed, with
costs.

enter into them. The case is decided on the ground that the evidence does not support the substantial as well as the formal matter of complaint made by the Respondents,—that it does not support what is essential to their case, namely, that the La Plata was guilty of negligence, from which the damage arose. In the absence of that it is impossible that the La Plata can be liable for the damage sustained by the *Hélène*; therefore the decision of the Court below must be reversed, with costs.

Toller, proctor for Appellants.

Clarkson for Respondents.

In the Privy Council.

Present—The Right Hon. Lord WENSLEYDALE.
The Right Hon. T. PEMBERTON LEIGH.
The Right Hon. Sir JOHN DODSON.

THE CITY OF LONDON, W. CAMPBELL, *Master*.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF
ENGLAND.

Collision—Vessel hove-to and Steamer—Lights—17 & 18 Vict.
c. 104, s. 298.

A smack, hove-to, saw a steamer approaching, but did not show a light, and a collision ensued. No default of a look-out was proved against the steamer.

Held, that the smack was not entitled to recover, it being probable that, if she had shown a light, no collision would have occurred. The party suing is bound to establish the negligence of the other party, such as the want of a sufficient look-out.

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THIS was an appeal from a sentence of the High Court of Admiralty, in a suit promoted by the smack *Celerity* against the steam-ship *City of London*. The Court below pronounced (a) in favour of the steamer, whereupon the present appeal was brought.

Forsyth, Q.C. and *Jenner* were heard for the Appellants, the owners of the smack.

(a) *Vide supra*, p. 248.

The *Queen's Advocate* and *Wilde*, Q.C. for the Respondents, were not called on.

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Their Lordships were assisted by Mr. *John Macdonald* and Mr. *James Brown*, Masters in the Royal Navy.

LORD WENSLEYDALE, in delivering the judgment of their Lordships, said:—We do not think it necessary to hear the counsel for the Respondents, because their Lordships consider the case has been very well argued by the Appellants, and we are in full possession of all the facts. This is an appeal from a judgment pronounced by the learned Judge of the Admiralty Court, and upon reading that judgment it would certainly appear, as Mr. Forsyth has argued, that the learned Judge had some little doubt in his own mind as to the conclusion at which he would arrive. He left two questions for the consideration of the Trinity Masters. The two questions are, “whether you are of opinion that the collision was occasioned by the want of a good look-out on board the steamer, and whether you think that if there had been a light on board the smack, the steamer would have seen it, and, in all probability, have avoided the collision.” The first question has not been distinctly answered by the Trinity Masters, but they have answered the second question very distinctly, which is also an answer to the case of the Appellants; namely, that if a light had been exhibited on board the smack, there would, in all probability, have been no collision. Now, we have had the benefit of the assistance of assessors, who have considered this case fully, and stated the grounds of their opinion; and they say in answer to the first question, that they are not satisfied upon the evidence that the steamer was at all to blame. They are not satisfied upon that, but they are both satisfied upon the other question; namely, that if there had been a light exhibited on board the smack, then in all probability the collision would have been avoided. That being so, the Appellant has not succeeded in satisfying us that the judgment was wrong. The Respondent being in possession of the judgment, must be taken to be *prima facie* right, and it lies on the Appellant to show the judgment to be wrong. If the Court entertain any doubt upon the question, they are bound to decide in favour of the party that has obtained the judgment of the Court below. With respect to the *onus probandi* in this case—as it was properly admitted by Mr. Forsyth, there is no question or doubt about the law. The party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly

Assessors not satisfied that the steamer had not a good look-out.

But they are satisfied that if a light had been exhibited by the smack, the collision would probably have been avoided.

Onus probandi is on the party seeking to recover.

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It was clearly
the duty of the
smack to ex-
hibit a light.

Judgment af-
firmed with
costs.

upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he leaves the case on even scales, and does not satisfy the Court, that it was occasioned by the negligence or default of the other party, he cannot succeed. Now, on the present occasion, their Lordships are of opinion, that he has not satisfied the conscience of the Court, that the cause of the loss was through the misconduct of the steamer. He has at all events left the matter in doubt, so that it is impossible, in the most favourable point of view, to decide whether the collision was occasioned by the misconduct of the steamer, or by the default of the smack herself. Now there can be no question in this case, but that it was the duty of the smack in the position in which she was, being hove-to, and seeing a vessel approaching, to exhibit a light; and if the master of a sailing ship chooses not to exhibit a light to vessels approaching, he must run the risk of his neglect. Looking at the whole of the evidence, their Lordships are of opinion, that on the balance of the evidence it is tolerably clear, that if a light had been exhibited, the accident in all probability would never have happened. That was the opinion of the Trinity Masters in the Court below, and that is the opinion also of the assessors, who have assisted us to-day with their judgment, and, being of that opinion ourselves, it is our duty to affirm the judgment of the Court below, with costs.

Jenner, proctor for the smack.

Deacon for the Respondents.

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In the Privy Council.

Present—The Right Hon. Lord WENSLEYDALE.
 The Right Hon. T. PEMBERTON LEIGH.
 The Right Hon. Sir JOHN DODSON.

THE JONGE ANDRIES, T. A. STEFFENS, *Master*.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Salvage—Agreement.

An agreement to perform a service of a salvage nature for a specific sum is not to be lightly set aside, either because the weather became tempestuous, or because the vessel was longer in arriving at a port of safety than might reasonably have been anticipated.

THIS was an appeal from a sentence of the High Court of Admiralty (a), in a suit by the master, owners and crew of the fishing-smack *Intrepid*, against the *De Jonge Andries* for salvage. The salvors had entered into an agreement with the master of the ship for a sum of 50*l.*, but they alleged that, in consequence of the tempestuous state of the weather, and of a gale having subsequently sprung up, they had rendered services not contemplated by the agreement. The owners, on the other hand, maintained, that the services rendered were included in the agreement, and had tendered 50*l.* The Court below was of opinion that the agreement was binding, and pronounced for the tender made by the owners with costs.

Forsyth, Q.C., and *Jenner*, for the Appellants.

Wilde, Q.C., and *Addams*, for the Respondents, were not called on.

The Right Honorable T. PEMBERTON LEIGH, in delivering Judgment. the judgment of their Lordships, said:—The real question between the parties is, what is the effect of the agreement into which they entered, and what were the services which the smack rendered to this ship? If the service agreed to be rendered was merely that of steering as a pilot ordinarily steers a vessel, where there is no danger and difficulty, and then something occurs, and additional services are rendered, then, of course, there is a

(a) *Vide supra*, p. 226.

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What were the circumstances under which the agreement was made?

The ship required other assistance than that of mere pilotage when the agreement was entered into.

And the fair construction of the agreement is, that it was for more than merely pilotage services.

just claim for additional compensation. In order to construe this agreement, we must look at the circumstances under which it was made, and the parties between whom it was made. In this case the ship, though not in actual danger, nor having incurred any damage which could subject her to any risk, was nevertheless in some distress. She had been strained in some degree, the weather was bad, and the pumps were kept occasionally at work as she was fast making water. Under these circumstances she required assistance, but of what kind? not merely the assistance of a licensed pilot to take her into port, but assistance of a totally different character, and the agreement which was made was not such a one as would have been made by a person following the profession of a pilot. In the course of the voyage the ship, being in distress, hails the smack, and enters into the agreement, the effect of which is, that the master of the smack was to go on board and pilot the galliot, and that the smack herself was to sail ahead. The question is, what is the meaning of that agreement? The learned Judge of the Court below has held, that the meaning of that agreement was, not that the master of the smack should act merely in steering the vessel, but that the master and crew should stand by in case of necessity, and give their aid, if required. That appears to their Lordships to be a perfectly reasonable construction of the agreement, having regard to the situation of the ship at the time the agreement was made, and to the parties between whom it was made. Their Lordships agree entirely with the reasons upon which the learned Judge of the Court below founded his decision, and they are much struck with the concluding part of his judgment, which they deem to be important as a rule of the Court. He says, "I now come to the next point of the case. It happens, as a matter of fact, though, as it appears to me, it does not matter one way or the other, that the vessel met with tempestuous weather, and she was considerably detained in the prosecution of her voyage to an English port. They seem to have been undetermined as to what port to have her taken. Sometimes she was to go to Ramsgate, at other times she was to go to a port in the neighbourhood of the Norfolk coast. Now, what was done by the master of the fishing vessel which was to change the nature of the agreement? He says, in effect, 'I assisted in pumping; the weather became tempestuous; there was considerable labour employed in keeping the vessel free. I worked myself, and by this means I converted this which was a pilotage into a salvage service.' Now I am of opinion, that a more dangerous doctrine than this could not be imported into this Court." And in that opinion their

Lordships entirely concur. "The Court has always held, with regard to pilots, that they are entitled to say, when they get on board vessels which are not seaworthy, and therefore in a state of danger, 'We do not come in the character of pilots only, but also in the character of salvors.' They are not entitled to abandon the vessels, but the Court has uniformly given them an additional reward, thinking they are not to be compensated for a salvage service by mere pilotage. But if you engage a pilot, and he lends a hand, in consequence of the necessity of the case, arising from the winds becoming more boisterous than they were before, and everything which is not strictly pilotage is to be construed into salvage, masters should be extremely cautious how they allow a pilot to touch a single rope, or to do any more than give directions." In this case, their Lordships are of opinion, that the towage or the salvage services, which it appears this master actually rendered, were services included under this agreement, which was entered into by the master of the galliot, for the purpose of getting that ship conducted to some safe port. We are of opinion, therefore, that the master is not entitled to any additional compensation beyond the sum which is mentioned in the agreement, and the judgment of the Court below, therefore, must be affirmed with costs.

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The agreement covers all the services, towage as well as salvage, which were rendered.

Judgment affirmed with costs.

Jenner, proctor for the Appellants.

Deacon, proctor for the Respondents.



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December 15.*In the High Court of Admiralty.*THE LINDA, J. A. MELCHER, *Master.**Collision—Abandonment—Subsequent Salvage Expense.*

The ships L. and G. came into collision, after which the G. was abandoned by her master and crew, and was picked up by another vessel and carried to Madeira, by which a large salvage expense was incurred. G. brought an action for damage against L., in which both vessels were pronounced to be in fault. On a further question, whether the expense of salvage was to form part of the damage which would be divided between the vessels, it was held, that, under the circumstances of the case, the G. was improperly abandoned, through want of ordinary nautical skill and resolution in her master and crew; that the salvage expense incurred was chargeable to such misconduct, and would form no part of the damage arising from the collision.

When a collision has taken place the burden of proof lies on those who assert that subsequent damage and expenses are not chargeable to the collision.

THIS was a question as to the amount of damage arising in a cause of collision, brought by the owners of the Georgina against the Linda, in which the Court had pronounced both vessels to be in fault. It appeared, that after the collision the Georgina had been abandoned by her master, and a few days afterwards picked up by another vessel and carried to Madeira; materials and a crew were sent by the owners of the salving vessel from Liverpool to Madeira, for which service a considerable salvage had been decreed. The owners of the Linda denied that they were liable for any part of this subsequent expense, which they asserted to be caused by the unnecessary and improper abandonment of the Georgina by her master and crew.

Burden of
proof on those
who assert im-
proper aban-
donment.

DR. LUSHINGTON stated, that he should require to be satisfied that the master had wilfully abandoned his vessel when he might have saved her, or that he had abandoned her through a want of ordinary nautical skill and resolution; but that, if there were extraordinary risk of life in remaining by her, or if it turned out to be a question of want of judgment in the master as to whether it were expedient to act in this or that way, he should consider the collision to be the cause of the whole damage and expense incurred.

Phillimore, A. A., and Spinks, for the owners of the Linda.

Addams and Twiss for the Georgina.

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December 15.The Court was assisted by Captains *Pixley* and *Close*.

DR. LUSHINGTON, addressing the Trinity Masters :—Gentle- Judgment.
men, this is a case of considerable importance with regard to the interests involved, but not as regards the principle applicable to what has been called consequential damage; for this, I think, I shall have no difficulty in clearly stating to you. We decided the other day that both these vessels were to blame for the collision. According to the law of this Court, the damage arising therefrom is to be divided equally between the owners of the two vessels; if there had been a cross-action, the cost of the damage received by the other vessel would also have been equally divided. At common law the rule is different. It is said, however, by the Linda, that the heavy salvage which became due from the Georgina was no necessary result of the collision, but arose from the default of the master and crew of that vessel. The question therefore for you to decide is, whether, looking at all the circumstances of the case, the abandonment of the Georgina was a reasonable act on the part of the master and crew? In other words, whether the vessel was improperly abandoned by the master in consequence of want of ordinary nautical skill and resolution? I say, with reference to all the facts in the case, because we cannot otherwise come to any fair conclusion on the question of want of ordinary skill or resolution, or of what danger was incurred. I consider that the master and crew, after collision, are not bound to incur extraordinary risk of life by remaining on board their vessel. Their obligation to remain by the vessel under the difficulties and risks of ordinary navigation is quite another matter. When a collision has taken place, though both vessels are to blame, yet the general inference is, that the damage accruing was caused by the collision, and the burden of proof is on those who wish to show that any part of it arose from subsequent want of skill in the crew of the damaged vessel. You have heard described, Gentlemen, the condition of the Georgina, when she was discovered by the salving vessel, a few days after her abandonment. From this you will consider whether you can infer that the master and crew could have navigated the ship with reasonable prospect of safety to some port. You will remember also, that a seaman was lost at the time of the collision; on the other hand, that the weather was fine and the season summer. I must also call your attention to what occurred after the collision. It appears that the master and one of the men got on board the Linda; the mate and the rest of the

Was the abandonment of the Georgina a reasonable act?

Or was there a want of ordinary nautical skill and resolution?

Crew are not bound to incur extraordinary risk of life.

Burden of proof.

Facts of the case.

Could the Georgina have been navigated to some port with reasonable prospect of safety?

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crew remained on board the Georgina. We have heard considerable argument as to what occurred directly afterwards in the course of that morning. I think it perfectly true that the Linda stopped by the brig, that those on board her offered the master and crew every assistance in their power, in the way of provisions, spars, sails and rigging; and everything no doubt would have been done by them had the offer been accepted. There was no offer, however, made to stay by the vessel or to take her in tow. Afterwards the master determined to abandon the brig, and it does not appear that any of her crew wished to remain on board of her. What is likely to have actuated the master in coming to such determination? No benefit could arise to himself, the owners, or crew, by the course he adopted; his interest was to bring the ship and cargo safe to port. It is said *mala fides* is proved by the asserted attempt to scuttle the brig; till lately, such an act would have been a capital offence, and now it is a highly penal one. If you can depend on the evidence of the witness Gladding, and the asserted confession of the master as to the attempt to scuttle, it would, I think, affect the whole merits of the case; but such a crime is not hastily to be presumed, still less likely is it that an attempt—for nothing was actually done—should be talked about and confessed.

The Court and the Elder Brethren having retired for consultation, on their return,

Opinion of the
Trinity Masters.

Abandonment
unjustifiable.

DR. LUSHINGTON said:—The Trinity Masters are of opinion that the abandonment of the ship, under the circumstances, was unjustifiable; that a master of ordinary skill and ordinary courage ought to have attempted to save the vessel, which most probably would have been accomplished with the means and assistance offered. Consequently, the expense incurred by the actual salvage cannot be considered as the result of the collision in this case. So far as relates to the collision, each party must pay their own costs; but the party proceeding must pay the costs occasioned by the question of the subsequent salvage expense.

Clarkson and Son, proctors for the Georgina.

Thomas and Capes for the Linda.



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THE LINDA FLOR.

Collision—Damage—Wages—Priority.

Where a foreign ship is condemned in damage arising from a collision, and the proceeds of the sale are not more than sufficient to meet that damage, her crew have no prior right against the ship for their wages.

THIS was a suit against a Portuguese ship for mariners' wages. It was opposed by a party who had obtained a decree against the vessel in a cause of damage, the proceeds being insufficient to meet all the claims.

The *Admiralty Advocate* for the mariners.

Addams, contrà, relied on the case of the *Chimara*, decided 1852 (a).

DR. LUSHINGTON:—The facts in this case, so far as they relate to the question at issue, are the same as the facts in the case of the *Chimara*; and I was then of opinion that the mariners could not maintain their claim to the prejudice of the parties who had obtained a decree in the cause of damage. As the same point has been again mooted, the question for my consideration is, whether I see sufficient cause to depart from that judgment. I adhere to my opinion as expressed in the case of the *Chimara*, and I do so especially for the following reasons: that the mariner, besides a lien on the ship for his wages, has also a right of suing the owner personally; that in the case of a foreign ship doing damage and proceeded against in a foreign country, the injured party has no means of obtaining redress save by proceeding against the ship herself, which I apprehend is one of the most cogent reasons for all our proceedings *in rem*; that, in a case where the proceeds of a ship are insufficient to compensate for the damage done, to allow the mariners to take precedence of those who have suffered damage would be to exonerate so far the owners, to whom the damage is imputed, at the expense of the injured party,—the wrong-doer at the expense of him to

The claim of a party having obtained a decree in a cause of damage is prior to that of the seamen for wages.

The mariner has a lien on the ship, and a right of action *in personam*;

but the injured party, in the case of a foreign ship, has no remedy but *in rem*.

(a) November 25, 1852, not reported: *nares*, 7 Notes of Cases, Suppl., p. 1, but the Judge there referred to the *Be-* as laying down the rule.

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whom wrong has been done. For, as to the mariner, what is the hardship to which he is exposed? It is true he fails in his remedy against the ship, but his right to sue the owner remains unaffected. These reasons satisfy my mind as to what my decision ought to be, and they constitute the grounds of that decision; it is, however, not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew. This is not the case of a bankrupt owner; it will be time to consider such a case when it arises.

Loveday, proctor for the mariners.

Rothery for the owners of the damaged vessel.

THE RINGDOVE, — NUTMAN, *Master*.

Master's Wages—Mortgagee of the Ship in possession—Right to give Bail.

If a ship is arrested for ship and freight, a party shewing a *prima facie* title to freight is entitled to a release of the ship upon giving bail in the action.

In an action against ship and freight for master's wages, the mortgagee in possession is entitled to a release of the ship, upon giving bail in the action, notwithstanding the master has become liable in respect of bills of exchange drawn upon the charterers for the ship's use.

1858.
March 12.

THIS was an action by the master of the British ship Ringdove against ship and freight for his wages. The ship having been arrested, an appearance in the action was entered for Mr. George Thomas, as mortgagee of the ship in possession, and bail was tendered but refused. The Court was now moved on the part of the mortgagee to order the release of the ship upon bail being given to the amount of the action. This was opposed on the part of the master, on the ground that the mortgagee was not entitled to receive the freight; and that, where property was arrested for freight, it could only be released upon payment of the freight into Court.

Deane, Q.C., for the mortgagee.

Addams, Q.C., for the master.

Judgment.

DR. LUSHINGTON:—In this case the master has brought his action for his wages against ship and freight by virtue of the Merchant Shipping Act, 1854, s. 191, as he is undoubtedly

intitled to do; and the Court is bound either to keep its hand on the ship and freight, or to give him good security in their place.

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An appearance in the action has been entered for Mr. George Thomas as mortgagee of the vessel in possession, and bail tendered and refused; and the Court has to determine whether he is intitled to give bail and thereupon obtain release of the ship.

On the part of the mortgagee there is produced a copy certificate of the ship's registry with the mortgage indorsed, and a charter-party made between Messrs. Fernie & Brothers, of Liverpool, as agents of the mortgagee, and Messrs. Byrne & Co., in performance of which the freight in question has been earned. On the other side there is an affidavit by the master to the effect that by the insolvency of Messrs. Byrne & Co., the charterers, he has become liable upon certain bills of exchange drawn by him upon them for the use of the ship. It has been contended, that this gives him a claim to receive the freight and retain it for his own protection. And it is further contended, that the mortgagee is not intitled to the release of the ship because it has not been shown that his mortgage is still subsisting, and because, where property is arrested for freight, by the practice of the Court it can only be released upon payment of the freight into Court.

Now I must observe, that whatever determination I may come to, I do not in any degree decide who is actually intitled to the freight. The Court has no power to determine that question; that is the province of another Court (a). I have only to consider, whether the party claiming to give bail shall be allowed to do so and thereupon obtain release of the ship. Upon this question, I apprehend, the liability of the master upon the bills of exchange has no bearing, if the other party is otherwise intitled to give bail. If I allow bail to be given, I do not prejudice the master's right, whatever it may be, to receive or retain the freight; or to take the proper measures in endeavouring to obtain it. The only question for me, I repeat, is, Has this mortgagee a right to give bail in this action?

The right to give bail the only question.

As to the subsistence of the mortgage, so long as the mortgage remains on the face of the certificate of registry, the Court must presume that it is a valid and subsisting mortgage, and

A mortgage indorsed on the certificate of registry will be presumed to be unsatisfied.

(a) See *Bristow v. Whitmore*, 35 L. T. 173, where Chelmsford, L. C. decided, on appeal, that the master has no lien upon freight for disbursements or liabilities incurred for the ship.

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March 12.

The mortgagee in possession has a *primâ facie* title to freight,

will entertain no conjecture as to the possibility of its having been satisfied. I am of opinion, therefore, that the mortgage must be considered a subsisting mortgage, and that the operation of the mortgage and the charter gives Mr. Thomas a *primâ facie* title,—I do not say more,—a *primâ facie* title to the freight.

and therefore has a right to give bail.

But it is then contended that by the practice of the Court property arrested for freight can in such cases as this only be released upon payment of the amount of freight into Court. I must say I am astonished that such a proposition could be attempted to be maintained. The daily practice of the Court is the very reverse; and if in every action by master or seaman for wages the amount of freight was required to be brought in, it would occasion very great inconvenience and great additional and unnecessary expense. The settled practice of the Court is, that where a *primâ facie* title to freight is shown, a ship arrested for freight shall be released upon bail being given in the action. Where, indeed, cargo is arrested, it is otherwise, and the Court will order the owners of cargo to bring in the freight. But that is because they are debtors of freight.

Motion granted, with costs.

I am of opinion that Mr. Thomas has shown a *primâ facie* title to freight under the mortgage and the charter, and that he has a right to a release of the ship upon giving bail in the action. And I grant this motion with costs.

Rothery for the mortgagee.

Clarkson for the master.

THE CAMILLA, R. MILLAN, *Master*.

Ship — Master's Wages — Forfeiture — Wrongful dismissal —
17 & 18 Vict. c. 104, s. 191.

Neither error of seamanship in a master, nor neglect to communicate to a Lloyd's agent stranding of the vessel, nor neglect to sign a bottomry bond, works a forfeiture of wages.

Semble, the owner's remedy is by cross-action in a Court of Common Law.

A master, engaged for a voyage out and home, if wrongfully discharged abroad, is intitled to wages until he can obtain other employment; and, *semble*, until the termination of the entire voyage.

March 29.

THIS was a suit for wages, brought by Robert Millan, as the master of the barque *Camilla*. The following letter was the final contract of engagement.

" Mr. T. Michael,

London, Sept. 19, 1853.

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" Sir,—In consideration of your appointing me master of your vessel *Camilla*, now bound for Launceston, Van Diemen's Land, and from thence to any place or places you may order me, at the rate of 150*l.* per annum, I agree to obey your orders at all times and places, and attend to your interests, and if I neglect to do the same, and you become a loser in consequence of my negligence or error, I agree to pay you for such losses. And I further agree that you may discharge me during the voyage if you have reasonable grounds to do so; and I also agree not to be in the ship's debt.

ROBERT MILLAN."

Wages were claimed up to the 22nd of April, 1856.

Addams, Q.C., for the master.

Spinks for the owner.

The further particulars are sufficiently stated in the following judgment.

DR. LUSHINGTON:—This is a suit for wages, brought by Judgment. Robert Millan, formerly master of the *Camilla*. It is clear that Millan was, from the 19th September, 1853, hired as master of this ship; that he proceeded with the ship as master, and went to Launceston, in Van Diemen's Land; that he remained as master until the 23rd May, 1855, when, whether rightly or wrongly, he was forcibly dispossessed of his command and removed from the ship. Millan sues for his wages up to the 23rd May, 1855, and further up to the 22nd April, 1856, till which time he could not obtain employment. Whatever may be said as to this latter period, it is abundantly clear that, having continued master up to the 23rd May, 1855, he is intitled to recover his wages up to that period, unless it can be shown that by law he is barred from such recovery. In order to establish such a case, an answer was given in on behalf of the owner, which, after opposition, was reformed and admitted. The first article sets up the agreement of September, 1853; the third article pleads that the master, either from gross negligence or from want of skill and seamanship, allowed the vessel to strike upon the Hebe reef; the fourth article pleads that the master did not give timely information of the accident; the seventh article that he was frequently intoxicated and neglected to perform his duty, and improperly refused to sign a bottomry bond; and it is then pleaded that on the 23rd of May, 1855, the master was dismissed by the agent of the

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Questions in
the case.The alleged
misconduct of
the master does
not work a for-
feiture of
wages at Com-
mon Law or in
Admiralty:but is a sub-
ject of cross-
action.Effect of 17 &
18 Vict. c. 104,
s. 191.

owner at Launceston. It is not pleaded, however, that any one of the facts alleged, or all of them together, worked a forfeiture of the wages, but at the hearing it was so contended. Two questions then arise—First, whether, assuming all the facts pleaded to be true, a forfeiture of the wages up to the day the master left the ship has taken place? Secondly, if not, whether the master was lawfully dispossessed? At the hearing I pressed the learned counsel for the owner to state what were the principles or authorities upon which he could support his argument that a forfeiture had taken place. Upon that head I could obtain no satisfaction, nor was I surprised, for I believe none are to be found. I do not say, however, that a case might not exist in which the Court would refuse to pronounce for wages, such as the master not discharging the duty of master at all, making over the command of the vessel to another person—a case which might be imagined; but I know of no case where the master has actually discharged the duty, as in the present instance, where facts of this description have been admitted as an answer to his demand: precedents, of course, were not to be found in this Court, for the jurisdiction has too recently been conferred upon it to allow of any arising (*a*). I can find none at common law, and, for the reasons I am about to state, I think none can be found. I am of opinion that neither error nor want of seamanship, nor improper refusal to sign a bottomry bond could, in an action at law, where a master was suing for wages, be admitted as evidence in bar or even in reduction of his claim, if he had actually continued in command of the ship. But then it may be said, is there no remedy against the master, if, in essential respects, he has broken his agreement? That, I apprehend, is not so. I conceive that any injury the owner may have received under such circumstances might be elsewhere the subject of a cross-action. I apprehend that the law on this subject is to be found in the judgment in *Mondel v. Steel* (*b*), and in the notes in Smith's Leading Cases to *Cutter v. Powell* (*c*). It is with great reluctance that I have entered upon the consideration of what is done at common law, because I well know how easily I might fall into a mistake; but the circumstances of this case have compelled me so to do, and for this reason, that the jurisdiction as to the claims of masters for their wages is, by the 191st section of the Merchant Shipping Act, conferred upon this Court, and masters are thereby intitled to all the remedies which belong to mariners; and I conceive that the true intent of the section is, that I shall deal with all such cases on the same principles as a Court of Common Law would

(a) See *The Thomas Worthington*, 3 W. Rob. 131; *Exeter*, 2 C. Rob. 621.

(b) 8 M. & W. 868.

(c) Vol. 2.

do; and that the statute intended only to give masters a remedy against the ship, and to give this Court an equitable jurisdiction to take cognizance of and settle disputed accounts. In this case the question is not one of disputed account. Nothing stated in the answer of the owner is in the nature of a set-off; the claim is not a debt, or anything like a debt; it is a claim for unliquidated damages: nor do I think the peculiar terms of the contract render it otherwise. For these reasons I am of opinion that, even if the evidence supported the allegation, I must still pronounce for the claim of wages up to the time of dismissal.

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But I do not deem it right to leave my judgment to stand solely upon the reasons of law I have already stated. I think it right to examine the principal points in the allegation, and the evidence produced thereon. The first charge is, that the vessel was allowed to take the ground on the Hebe reef by the gross negligence or want of ordinary skill on the part of the master. Looking at the frequent dangers attendant upon navigation in distant seas, justice requires that so serious a charge should be established by clear and satisfactory evidence; the *onus probandi* is, of course, upon the owner who asserts the affirmative. Now, after examination of all the evidence, I can come to but one conclusion, that the charge of gross negligence or want of nautical skill is not affirmatively established. The next head of complaint is the alleged concealment of the accident. I certainly am of opinion, that in all cases of this description the proper course is to give information to the agent for Lloyd's. It is the safest course for the master, the most prudent as relates to the owner, and the most just to the underwriters. This omission is proved; but it has not been contended, and it never could be gravely maintained, that such a circumstance could affect the question of wages. As to the charge of concealment from the owner, I am of opinion that it fails equally in law and in fact. I am also of opinion that the charge of intoxication is not proved.

Charges
against the
master
examined.
Getting the
ship on shore.

Concealment of
the accident.

I now approach the last head, and perhaps it is the most singular averment in opposition to a claim for wages that ever found its way into the proceedings of this Court—improper refusal to sign a bottomry bond. The master denies the charge, and says that no bond was presented to him; but let me see how the fact stands upon the other evidence. What proof is there that any bottomry bond was ever presented to him for signature? What evidence is there as to the terms and contents of the bond? True it is that the master was authorized

Improper
refusal to sign
bottomry bond.

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by his owner to sign a bottomry bond, but upon what terms and upon what conditions the Court is left in total ignorance; and, looking at the whole transaction of this case, it is utterly impossible to come to a conclusion that the master can be convicted of culpability for not having signed a bond. On the other hand, there appears to have been practised towards him a species of coercion that the Court cannot but reprobate; he was arrested and thrown into prison for the debts of the ship; there is no evidence whatever of the original instructions to the master, none that any credit was open to him for the necessary wants of the ship when he arrived at Launceston; and I must add, that there are strong grounds for believing that after the ship arrived in this country the bottomry bondholder and the owner colluded together to defeat his claim for wages. But whether this be so or not, it is not necessary to pronounce any opinion upon the subject; I am of opinion that the charge of improperly refusing to sign a bottomry bond is not sustained by the evidence.

The master was illegally dispossessed, and is intitled to wages up to the period of obtaining other employment.

The conclusions I draw are the following: that all the charges are unfounded in law and unsustained by proof. I am therefore of opinion that, up to the time when the master was dispossessed from the vessel, he was clearly entitled to wages under the original contract. The question then arises, whether he was lawfully dispossessed of the command, and whether his claim to wages then ceased? And what is the admitted fact? Be the charges what they might,—instead of resorting to the tribunals of the country where the ship lay, and causing justice to be duly administered,—in the dead of the night, by force of arms, the master was ejected from the vessel. Against such an outrage this Court is bound to express its protest, for there was not a shadow of necessity to justify such proceedings. I hold, therefore, that the master was illegally dispossessed of his command, and that all his rights under the contract remain unaffected by proceedings so utterly unjustifiable. Then as to the remedy. In strictness the master would be intitled to wages up to the termination of the contract, but he has claimed them only up to that period when he obtained employment. I pronounce for his claim, and with costs.

Brooks, proctor for the master.

Fox, Nicholl and *Fox* for the owner.



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In the Privy Council.

Present—The Judge of the High Court of Admiralty.
The Lord Justice KNIGHT BRUCE.
The Right Hon. T. PEMBERTON LEIGH.
The Lord Justice TURNER.

THE NEWPORT, HOCQUARD, *Master.*

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF ST.
HELENA.

*Slave-Trade — Forfeiture and Penalties — 5 Geo. 4, c. 113,
ss. 4, 7—Proceedings in Vice-Admiralty Court and in Court
of Appeal—Onus Probandi—Costs and Damages.*

In a cause of appeal from the sentence of a Vice-Admiralty Court, decreeing forfeiture of a ship and penalties on the shippers under 5 Geo. 4, c. 113, the captors, to support the condemnation of the ship, must prove that the owners of the ship knowingly and wilfully employed the ship in contravention of the Act; and, to support the decree for penalties against the shippers, must prove that they knowingly and wilfully shipped the goods on board the ship to be so employed.

Barton v. The Queen, 2 Moore, P. C. C. 19, followed.

In the Vice-Admiralty Court the parties implicated, if known, must be cited by name in the monition of the Court, to show cause against the forfeiture and penalties, as required by the Order in Council, issued under 2 & 3 Will. 4, c. 51; and if the monition be general only, no penalties against individuals can be pronounced for.

If the Judge believes that the parties implicated are *bona fide* ignorant of the proceedings, he should suspend his judgment for the penalties.

Shippers, not cited by name in the monition of the Vice-Admiralty Court, and condemned in penalties, allowed to intervene in the appeal promoted by the owners of the vessel.

A special libel of appeal, with allegation and responsive allegation, pleading new matter, admitted by the Court of Appeal, and evidence taken thereon.

Under the circumstances of the case, the Court of Appeal, reversing the sentence of the Court below, restored the ship, with costs and damages, and remitted the penalties of the shippers, with costs, but without damages, and refused costs to the owner of the cargo, who had not cleared himself by making an affidavit.

THIS was an appeal from a decree of the Vice-Admiralty Court of St. Helena, whereby the brigantine *Newport*, of Jersey, was condemned for having been engaged in the slave-trade, in violation of the Act 5 Geo. 4, c. 113, and Messrs. Pinto, Perez & Co., merchants of London, the shippers of the cargo on board the *Newport*, were condemned in penalties to the amount of 12,915*l.* 17*s.* 6*d.*, being double the value of the

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cargo. The original appellant was Charles Hocquard, on behalf of the owners of the vessel, who, by permission of the Court, brought in a special libel of appeal; Messrs. Pinto, Perez & Co., who had not been cited by name in the monition of the Vice-Admiralty Court, then intervened for their own interest, and Perez intervened for Francisco Antonio Flores, the sole owner of the cargo, and their Lordships allowed them to bring in an allegation, pleading the same facts and exhibits as pleaded in the libel of appeal. Evidence was taken upon this allegation, and also upon the allegation on behalf of the Crown, and a responsive allegation.

The case was heard on the 1st, 2nd, 3rd and 7th days of December, 1857.

Sir *Frederic Thesiger*, Q.C., and *Forsyth* for Hocquard and Pinto, Perez & Co.

Dr. *Twiss* for Perez, claiming for Flores.

The Queen's Advocate (Sir *John Harding*), the Attorney-General (Sir *Richard Bethell*), and *Jenner* for the Crown and the captors.

On the 3rd of February, 1858, the Right Hon. T. PEMBERTON LEIGH delivered the following judgment:—

Judgment of
the Court be-
low.

This case comes before the Court by appeal from a sentence of the Vice-Admiralty Court of St. Helena, dated the 20th of November, 1854, by which the Judge “pronounced the British brigantine or vessel called the Newport, whereof C. J. F. Hocquard was master, to have been engaged, at the time of her seizure, in the slave-trade, contrary to the provisions of the Act of 5 Geo. 4, c. 113, and as such or otherwise, subject to forfeiture to the Queen, and condemned the same accordingly.” The Judge, moreover, “pronounced for the penalties due under the provisions of the said Act, (that is to say,) that the sum of 12,915*l.* 17*s.* 6*d.* is due by Pinto, Perez & Co., the shippers and owners of the goods wares and merchandize laden on board the said vessel, to wit, double the value of the goods, &c., and condemned Pinto, Perez & Co. in such penalties accordingly, and in costs, and ordered that the said goods wares and merchandize should be held in deposit until the said penalties and costs should be paid.”

5 Geo. 4, c. 113.

The sentence is founded on an alleged breach of the provisions

of the 5 Geo. 4, c. 113, and it is material, therefore, to state what are the provisions of that Act, and what construction has been put upon it by judicial authority. The Act provides, by the 2nd section, that all dealings in slaves (except in certain special cases provided for by the Act) shall be unlawful, and that it shall be unlawful for any person to let to hire, use or employ any vessel for the purpose of such trade, or to ship or contract for the shipping of any goods on board of any vessel for the purpose of being employed in such trade. By the 4th section, any ship so employed is subjected to condemnation, together with all property found on board the ship belonging to any owner or part owner of the ship. By the 7th section it is provided, that if any person shall wilfully and knowingly ship any goods on board of any ship to be employed in contravention of the objects of the Act, such person shall be subject to a penalty of double the value of the goods. By the 10th section, persons guilty of the acts forbidden in the previous sections are declared to be guilty of felony; and, by the 11th section, seamen serving on board any ships with a knowledge that they are to be employed contrary to the Act, are declared guilty of a misdemeanour. By the 51st section, it is provided that the penalties may be sued for, either in any Court of Record in Great Britain, or in any Court of Record or Vice-Admiralty Court where the offence was committed, or where the offender may be found after the commission of such offence. Although the penalties thus inflicted on shippers of goods are imposed, by the 7th section, only on such persons as shall wilfully and knowingly ship them for the purpose of contravening the Act, the words "knowingly and wilfully" are omitted in the 4th section, which applies to the letting to hire the ship to be employed for this purpose, and subjects the ship so employed to forfeiture. A question, therefore, was naturally raised, whether such words were to be implied from the whole context of the Act with respect to the owner of the ship, and whether a ship employed in carrying such goods, though without the knowledge of the owner, was not subject to forfeiture, on the principle which is often found to prevail in cases of breach of the Revenue laws. This question came before the Judicial Committee in the case of *Barton v. The Queen* (a); and it was then decided, after long deliberation, that in order to subject the ship to forfeiture, it was necessary to prove guilty knowledge on the part of the owner, and that the *onus* of proving such knowledge, both as to the owner of the ship, and as to the shipper of the goods, lay upon the seizers. In the case of *Del Campo v. The Queen* (b),

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Construction of section 4 and section 7 determined by *Barton v. The Queen*: ship not liable to confiscation, unless proved to be employed wilfully and knowingly for slaving purposes; nor shippers liable to penalties, unless proved to have shipped wilfully and knowingly, &c.

(a) 2 Moore, P. C. C. 19.

(b) 2 Moore, P. C. C. 15.

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it was held that the cargo on board a ship employed in contravention of the Act, though shipped with a guilty knowledge, is not subject to forfeiture unless the goods belong to the owner of the ship. In order, therefore, to sustain the sentence in the Court below, it must be shown, as to the ship, that she was employed in contravention of the object of the Act, and that she was so employed with the knowledge of the owner; and as to the shippers, that the goods had been shipped by them wilfully and knowingly, for the purpose of being so employed. Such being the law, what are the facts?

Facts of the
case.

Shipbrokers.
Charterers.
Shipowners.

Charter-party.

Consignee of
cargo.

Cargo.

The Newport belonged to Le Sueur & Co., merchants in Jersey. Messrs. Banner, Brothers & Co., of the City of London, shipbrokers, were employed by the owners to make engagements for the ship. On the 21st of April, 1854, Banner, Brothers & Co. agreed to charter her for a voyage to the west coast of Africa, out and home, to Messrs. Pinto, Perez & Co., who are merchants of character in the City of London. The charter-party is made between John Le Sueur of the one part, and Pinto, Perez & Co. of the other part, and it is thereby agreed that the ship shall receive on board, in the river Thames, such lawful goods as the charterers shall send alongside, and shall proceed therewith to Ambriz, on the west coast of Africa, and thence, if required, to Loanda, and afterwards reload, at either or both places, a cargo of lawful merchandize, and proceed therewith to London direct. The freight to be paid for the voyage out and home is 900*l.*, of which 400*l.* are to be paid on the ship sailing from London, and the remainder on the delivery of the return cargo. The ship was thus chartered by Pinto, Perez & Co. on behalf of Mr. Francisco Flores, a Brazilian subject, resident at the Portuguese port of Loanda, on whose account they had received orders, through a Mr. Garrido, his clerk and agent, to purchase and ship a cargo, to be consigned to him at Ambriz or Loanda. Accordingly, between the date of this charter-party and the 8th of June following, they purchased and shipped a cargo on board the Newport for the account of Flores, the invoice value of which was 6,457*l.* 18*s.* 9*d.*, being one-half of 12,915*l.* 17*s.* 6*d.*, the amount of penalties in which they have been condemned.

The cargo consisted of Manchester goods, to the amount of above 4,000*l.*, earthenware, hardware, muskets and various miscellaneous articles, amongst which are the following:—Forty-five casks for palm oil, 38*l.* 1*s.*; 120 bundles new iron hoops, 42*l.*; 100 packs, (which we understand to be bundles of staves, to be made into casks,) and which are described in the invoice as

pipas abatidas, for palm oil, capable of containing 12,645 gallons. These packs are set at 80*l.* 1,000 demijohns, 72*l.* 18*s.* 4*d.*

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This cargo was shipped in the port of London, under the inspection of the Custom-house authorities; the particulars of the cargo, to which we have adverted, were all specified in the ship's manifest, signed by the master. The ship was regularly cleared at the Custom-house on the 9th June, 1854, as appears by the certificate of the Custom-house officer. The invoice, which specified the different goods, was intitled "Invoice of sundry merchandize, shipped from London to Ambriz and Loanda (Angola) by the ship Newport, Captain Hocquard, by order of Mr. A. Garrido, to consignment and for account and risk of Mr. F. A. Flores, of Loanda." The manifest described the vessel as bound for Ambriz, and the cargo as shipped by Pinto, Perez & Co., and consigned to Flores. There was not the slightest attempt at concealment of any kind, and no irregularity whatever is suggested by the Respondents to have been committed, unless the omission to give a bond with respect to the packs, to which we shall presently advert, can be considered to fall under this description.

Ship's clearance.

Loanda is a Portuguese settlement, and Ambriz, at present, is also in the hands of the Portuguese Government. What was its condition, at the time of this shipment, does not appear very distinctly: some of the witnesses describe it as at that time in the possession of the Portuguese; others speak of it as in the occupation of an African Chief. However this may be, it was apparently considered, by the Portuguese authorities, to be within their territory; for, on the 9th of June, 1854, Mr. Vanzeller, the Consul-General of Portugal in London, signed and delivered to Mr. Hocquard a certificate to be presented at the Custom-house at Ambriz, of a declaration made by Hocquard in compliance with the regulations of the laws of Portugal; and a letter was addressed by Mr. Vanzeller to a gentleman described as the administrator of the Custom-house at Ambriz. Although, therefore, it turns out that at that time there was no Custom-house at Ambriz, the shippers (if they had no other knowledge of the matter) might well suppose that Ambriz was in the possession of the Portuguese, and that there was a Custom-house there.

Port of destination.

The ship, furnished with all these documents, set sail on her voyage under the command of Captain Hocquard, on the 9th or 10th of June, 1854, and arrived off the port of Ambriz on the 21st of September following, where she was boarded by an

Ship seized, and sent to St. Helena for adjudication.

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Permission refused to master to communicate with his consignee, and no notice of seizure given to consignee.

Monition of Vice-Admiralty Court at St. Helena did not cite by name shippers or consignee.

Affidavit of prosecuting officer.

officer of her Majesty's ship *Philomel*, a gentleman named Dalison. This officer examined the cargo and papers of the vessel, and was furnished by the master with every information relative to the ship, the cargo, and the voyage which she was then prosecuting. Mr. Dalison then left the ship, and she was soon afterwards seized by Captain Skene, the commander of the *Philomel*, for being, as he alleged, engaged in the Slave Trade. Captain Skene informed the master that the only ground on which he suspected that the vessel was so engaged, was that there was a number of packs on board, for which he had no certificate from the Custom-house of the port from which he had cleared outwards, stating that sufficient security had been given that the packs should be used only for the purpose of lawful commerce. The Newport being a British vessel, seized by a British cruiser, a Court of Vice-Admiralty was the proper tribunal to adjudicate upon her; and Captain Skene, having removed to his own ship a certain number of her crew, and put on board three of his own men under the command of Lieutenant de Robeck, ordered the ship to be taken to St. Helena, as the nearest and most convenient port where there was a Court of Vice-Admiralty. Lieutenant de Robeck sailed with her accordingly, and on the passage kept her for twenty-four hours off the port of Loanda, where Flores was residing. The master requested permission to communicate with his consignee; but this was refused, and no notice of the seizure was given to Flores by the captors.

The ship arrived at St. Helena on the 8th of October, and on the 16th, at the instance and on the affidavit of Lieutenant de Robeck, a monition was issued out of the Vice-Admiralty Court of St. Helena, the terms of which are material. The monition is issued against Hocquard, the master of the vessel, Francis Le Sueur and Philip Le Sueur, the owners thereof, and all persons in general who have or pretend to have any right, title or interest in the said brigantine or vessel, her tackle, apparel and furniture, and the cargo laden therein, and the parties so monished are to show cause why the ship and cargo are not liable to forfeiture and condemnation, and why the penalties due by law should not be pronounced for. Le Sueur & Co., as the owners, are expressly named in the monition; but there is no mention of the name either of Pinto, Perez & Co., or of Flores. Lieutenant de Robeck's affidavit, after verifying various papers found on board the ship, including the several documents already alluded to, stated that Mr. Dalison, the officer originally sent on board the vessel, had reported that no certificate was found on board from

the Custom-house of the port from which she had sailed, with respect to the water-casks, packs or shooks, part of the cargo; and he stated that he knew Flores, the consignee of the cargo; that Flores was a notorious slave-dealer, and that he had no other occupation, calling or profession, but that of a dealer in slaves, and of bartering with goods imported for slaves for exportation. Though Lieutenant de Robeck swore thus positively to these facts, he did not state how he had acquired a knowledge of them, and from his subsequent examination it appears that he did not know them at all, that he never saw nor was acquainted with either Garrido or Flores, nor ever saw anything of any slave establishments of theirs, and that he knew nothing of them except from the information of others. There is no mention of Pinto, Perez & Co., in this affidavit any more than in the monition, nor any statement that the defendant believed, or had the least reason to believe, that either Le Sueur & Co., or Pinto, Perez & Co., were in any manner privy to the illegal employment of the vessel. Hocquard, the master, had been deprived of all his papers, and had been refused all opportunity of communicating with Flores, his consignee; and, in this difficulty, he applied to Mr. Fowler, a proctor at St. Helena, to claim the ship for Le Sueur & Co., whom he knew to be the owners of the ship, and the cargo for Pinto, Perez & Co., whom he knew to be the shippers, and supposed to be the owners, of the cargo. On the 26th of October, accordingly, a claim was carried in by Fowler, which is styled the claim of Hocquard, the master, on behalf of himself and Le Sueur & Co., the owners of the Newport, and on behalf of Pinto, Perez & Co., of London, merchants, as the shippers and sole owners of the cargo.

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Claim for ship-
owners and
shippers put in.

In support of this claim the master, on the same day, made an affidavit, in which he went very fully into all the circumstances of the chartering of the vessel and the shipment of the cargo by Messrs. Pinto, Perez & Co.; he said, "that the cargo was shipped in London, under the eye and surveillance of the Customs authorities at the port;" "that the deponent had every reason to believe, and did at the time of making his affidavit believe, that the cargo was truly and solely for the purposes of lawful commerce, and that it was never contemplated nor intended by any parties or party whatever engaged, either in the fitting and chartering or freighting the said brigantine or vessel, or in the shipping or consigning the said cargo, or in the navigation or management of the said brigantine or vessel in the said voyage, that the said brigantine or vessel, or the said cargo, or any part or parcel thereof, should be engaged in, or used or

Master's affidavit full and satisfactory;

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devoted to, any other than the purpose of lawful traffic.”

“ That previous to his clearing from London, he made certain declarations, and signed certain documents, at the Custom-house of that port, relative to the voyage and cargo of the vessel, as is usual in such cases ; that he relied entirely on the brokers to do whatever was necessary to procure all requisite documents from the Custom-house authorities, and that he had every reason to believe, and did believe, that every necessary declaration, bond or document, requisite and usual to be made, signed or given to the Customs of the port from which a vessel clears outward with a cargo, had been made, signed and given in the case of the said vessel, and that every necessary document or certificate, or ship’s paper of any description, required to enable the vessel to proceed securely on her voyage, and to prove the nature of the traffic in which the vessel was engaged, was furnished to him, as master, on his clearing out as aforesaid, and was amongst the papers and documents delivered by him to Captain Skene, at the time of the seizure and detention of the vessel.” With respect to the packs, he stated that he was not aware of the particular purpose to which they were intended to be applied, but that they were put on board as part of the cargo, and not for the use of the vessel ; and that he, the deponent, had no means, within his knowledge, of converting the said packs into water-casks, or casks of any description, even had he so desired. He said that the demijohns were not shipped for nor intended to be used on board the said vessel for the purpose of containing water, or for any other purpose whatever than that of being delivered, with the remainder of the cargo, according to the terms of the charter-party and bill of lading ; and that he was informed by Captain Skene himself that the demijohns were articles of legal traffic, and that he did not rest anything on their being on board the said vessel. He said that all the articles objected to were entered on the ship’s manifest, and were, to the best of his belief, solely for the purposes of lawful trade ; and were, as he was credibly informed, continually imported into Africa for the purpose of lawful trade. With respect to the allegations in De Robeck’s affidavit against Flores, the deponent stated that he knew not Flores, and that he was unable, therefore, either to admit or deny the allegations respecting him ; that he had no further knowledge of the person to whom the vessel and cargo were consigned than the name of the party, gathered from his instructions and ship’s papers. He stated that he had made a former voyage, as master of the vessel, to the coast of Africa ; had taken out a cargo of coals, and had brought back a cargo of palm oil ; and that he believed that the vessel had always been employed in making voyages to and from

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London and the said coast, and had never been engaged in the slave trade; that he had been long acquainted with the owners of the brig; that they were shipowners and merchants of high reputation and unblemished character, both at Jersey and wherever their name is known, and that the deponent truly believed that they never had been, nor would they or any of them be, engaged in carrying on, or aiding, abetting or encouraging, the African or any other slave trade, under any pretence or for any reward or remuneration whatever; that he also knew, and was well acquainted with the house of Banner, Brothers & Co., and that they are brokers of long-established and wide-spread reputation, and that he had never heard of, nor had the slightest reason to suspect, their being connected in any transactions with, or which might in any way further, the slave trade; that he also knew the house of Pinto, Perez & Co., the charterers of the said vessel, and that they have large transactions with the coast of Africa, and are continually receiving into England from thence cargoes of the various productions of the country, and that the deponent had never, either directly or indirectly, heard that they were, or ever had been, concerned in the slave trade in any way whatever, and that the deponent verily believed they never had been nor were so concerned. It would be difficult to frame an affidavit, going more fully and distinctly into every part of the case than this, or more completely negating, as far as the knowledge and belief of the deponent extend, all privity on the part either of Le Sueur & Co., or of Pinto, Perez & Co., to any unlawful use of the ship or cargo.

The affidavit of Hocquard was confirmed by the papers and letters found on board the ship, as far as any inference could be derived from them, and by the affidavit of De la More, the chief officer of the vessel, under the master, who stated that he was employed to receive on board the vessel the different packages then on board of, and forming part of the cargo of, the vessel, and that the whole of the cargo, and every part and parcel thereof, were regularly and duly shipped in London, and brought on board the said vessel in the ordinary manner; and that with every separate shipment thereof he, the deponent, to the best of his recollection and belief, received a boat or shipping-note, bearing the Custom-house stamp, and that he had several of the said shipping-notes in his possession at the time of the seizure of the vessel, and had since delivered the same to the master of the vessel. There was further, an affidavit by Mr. Pritchard, a Custom-house officer at St. Helena, by which, on behalf of the claimants, he deposed that it appeared to him from the papers

and otherwise confirmed.

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Sentence of
Court below.Order in Coun-
cil issued under
2 & 3 Will. 4,
c. 51, clearly
not observed ;

and documents found on board the ship, and brought in by the captors, that the provisions of the Act 16 & 17 Vict. c. 107, intituled "An Act to consolidate and amend the Laws relating to the Customs of the United Kingdom, &c.," had been complied with, and that the vessel was duly cleared out from the port of London on the 9th June last, for Ambriz, on the west coast of Africa, with a cargo consisting, among various other articles, of 100 packs of staves, 1,000 demijohns, and 25 casks of muskets, all of which are entered on the manifest of the vessel. Lieutenant de Robeck made a second affidavit, verifying copies of certain letters and documents relating to Flores, which the Judge admitted ; though, from a subsequent explanation of the grounds of his judgment, he does not appear to have given them much weight. On the 20th November, 1854, the cause came on for hearing, and on the same day the sentence complained of was pronounced by the Court.

It is contended by the Appellants that this sentence is not only entirely unwarranted by the evidence before the Court, but that it was pronounced in direct violation of the regulations contained in an Order in Council, issued under the authority of the 2 & 3 Will. 4, c. 51, by which Order the proceedings of Vice-Admiralty Courts in cases of this description are, or ought to be, governed (a). One of these regulations provides, that if the owners or parties implicated are known, they shall be cited by name in the monition. Pinto, Perez & Co. were known to be the shippers of the cargo. Flores was known to be the consignee and owner (this appears by De Robeck's examination) ; yet neither Pinto, Perez & Co., nor Flores are cited. "If the monition contain the names of the owners or others, from whom penalties are sought to be recovered : " (in other words, if such persons are known) the regulations provide that the monition shall be personally served on the parties ; the object being obviously to secure due notice and opportunity of defending themselves to the individuals liable to be affected by the judgment. Here the names and residences, both of Pinto, Perez & Co., and Flores, were perfectly well known, yet there was no service upon them, and no notice of any sort given to them. It is provided by the regulations that if it shall appear to the Judge by affidavit that personal service cannot be effected on the parties (if any) named in the monition, by reason that they have personally absented themselves to avoid service, the Judge is to pronounce his decree ; but if he has reason to believe that the parties are

(a) 4 Moore, P. C. C. 170, note.

bonâ fide ignorant thereof, he ought to reserve his judgment, so far as relates to the penalties sued for, and also as to the slaves and vessel if any doubt shall arise upon the evidence. Here, there had been no attempt to serve either Pinto, Perez & Co. or Flores personally; there was doubt, as to Flores, whether the transaction was illegal; there was more than doubt as to Le Sueur and Pinto, Perez & Co.: yet the Judge, instead of suspending his sentence, pronounces, on the same day on which the case is brought on, a decree of condemnation. Finally, in the case of a monition citing all persons in general, and not describing any persons by name, no penalties against individuals can be pronounced for. Here Pinto, Perez & Co. are not cited by name, yet the Judge pronounces for penalties against them to the amount of nearly 13,000*l*. It is no excuse for these irregularities that the master, (who had no authority at all to appear for Pinto, Perez & Co.,) in the state of ignorance in which he was, instructed a proctor to give in a claim for Pinto, Perez & Co., as sole owners of the goods. It was perfectly well known to the captors that Pinto, Perez & Co. were not the owners at all, and that the goods belonged to Flores, from whom all knowledge of the proceedings, as far as the captors were concerned, had been kept. It is said that, although Flores had no official notice of these proceedings, he was acquainted with them, and might have attended to protect his interests. It by no means appears that he had any opportunity of doing so. There is evidence, indeed, that by the 14th of October he had heard of the seizure of the Newport, and that by the 10th of November he had heard, indirectly, that she had been taken to St. Helena; but there is no communication between Loanda and St. Helena, except by cruisers, and on the 20th of November the sentence was pronounced; Flores had a right to rely on the observance by the Court of rules in themselves positive and essential to the due administration of justice, and the captors, who had kept him in ignorance of their proceedings, cannot very reasonably object that he did not appear to them.

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and without
any justification.

It is contended, however, by the Respondents, that the case has now assumed an entirely different aspect; that any irregularities in the original proceedings are immaterial; that it comes before their Lordships on new pleadings and new evidence; and that there is now sufficient ground both to affirm the original sentence and to pronounce an original sentence of condemnation of the cargo, and of infliction of penalties upon Flores.

New evidence
before the
Court of Ap-
peal.

The case certainly comes before their Lordships in a very

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singular shape. In addition to the ordinary petition of appeal and transcript of the original proceedings and evidence, we find, amongst the papers before us, a libel of appeal, supported by affidavits, on the part of Hocquard, as representing Le Sueur & Co. and Pinto, Perez & Co.; an allegation on the part of Pinto, Perez & Co., as interveners; a claim for the cargo by J. M. Perez, as attorney for Flores, praying restitution, with costs and damages; a responsive allegation on the part of the Crown; and a further allegation on the part of Pinto, Perez & Co. Upon these further pleadings a vast mass of additional evidence, both oral and documentary, has been produced by both sides. Witnesses have been brought over by the Crown, at a great expense, from the Brazils, from Portugal and from Africa; every matter bearing upon the transaction has been the subject of investigation, besides many bearing upon it not at all, or but very remotely; and the result is found in a second Appendix of 300 closely-printed folio pages, in addition to the first Appendix of above 100. The costs of these proceedings, therefore, form a subject of consideration not less important, perhaps, in a pecuniary point of view, than the matter itself in dispute.

**Questions for
the Court.**

The points to be determined remain, however, as against the original parties, the same as they were at first. As regards Le Sueur & Co., is it made out that the ship was employed with their knowledge in any manner in contravention of the statute of 5 Geo. 4, c. 113; as against Pinto, Perez & Co., is it made out that they shipped the goods in question wilfully and knowingly for the purpose of being so employed?

**Respondent's
case.
Character
of consignee,
nature of port
of destination,
description of
cargo.**

The case attempted to be made by the Respondents is this:— That Flores was, at the period of the transaction in question, and had been long previously, engaged in the slave-trade; that Garrido, his agent, had also been long engaged in the same traffic, first on his own account, and afterwards on account of Flores; that the employments of Flores and Garrido were notorious to everybody who had any trade with the west coast of Africa; that Flores had, in truth, no other real trade; that Ambriz was a port which had no trade except in slaves; and it is argued that, under these circumstances, it must be presumed that the goods in question were intended to be employed in the slave-trade, and that Pinto, Perez & Co. and Le Sueur & Co. had notice of that fact. It is insisted further, that the cargo was of a character to excite suspicion, and that, although the Act under which a bond with respect to casks (or, as it is contended, packs, to be made into casks) is required, may not apply to this case,

still that it was the practice of the Custom House in London to require a bond in such cases, and of merchants to give it; and that the absence of such bond adds to the suspicion which the cargo itself is calculated to create. It is useless to go in detail through the mass of the documents and depositions, in which there is much matter contained which cannot be regarded as evidence, and some evidence to which little credit can be given, except in so far as it is corroborated by other testimony or by circumstances. This observation applies more especially to Monteiro, who has been brought over from Africa by the Crown, in order to be a witness, and who states that he is to receive 1,200*l.*, in addition to his expenses, for coming. On this witness, as well from the account which he gives of himself, and from the letter which he admits having written to Garrido, as from the contradiction given to his evidence in several particulars, their Lordships are of opinion that they cannot place much reliance.

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A careful examination of the papers, after the long and very able discussion which the case underwent at the bar, has brought their Lordships to the following conclusions. It is clear that, at a period antecedent to the date of the present transactions, both Flores and Garrido were largely engaged in the slave-trade, and that, for several years before 1851, they were employed in the regular purchase and transmission of slaves from the west coast of Africa to a company of merchants at Rio de Janeiro. In 1851, however, strenuous efforts were made by the Brazilian Government to put down the traffic; and, as far as regards the Brazils, these efforts appear to have been attended with great success. British and Portuguese Commissioners were resident at Loanda for the purpose of enforcing the execution of the treaties relating to this subject. One of the gentlemen, who was the British Commissioner there for several years, Sir George Jackson, has been examined as a witness for the Crown in this case, and it appears from his evidence that, in 1851, he reported to his Government that the slave trade was most sensibly diminished, and that any occasional shipments of slaves had been principally from the south of Loanda (Ambriz is to the north of Loanda). In January, 1853, the British Commissioners reported that the slave traffic was so far extinct that nothing but a change of policy on the part of Brazil could effect its revival to any considerable extent; and this opinion was shared by the Portuguese Commissioner Valdez. In the year 1853 there seems to have been some increase of the slave-trade both north and south of Loanda, mentioned in the Commissioners' Report of 1854; but

Conclusions of
the Court as to
the facts.

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in February, 1855—speaking, therefore, it is presumed, of what happened in the year 1854—they reported that such increase had been only momentary, and had entirely ceased. It is said, however, and there is reason to believe, that, although the trade with Rio was stopped, Flores, and Garrido as his agent, were, at different times after 1851, engaged in adventures of sending slaves to Cuba. So strong a suspicion, at all events, was entertained on that subject by the British authorities that urgent remonstrances were addressed to the Portuguese Government against permitting him to remain in their territory in Africa, and in consequence, in the beginning of 1854, an order for his removal, within five months, was issued, which was served upon him in June, 1854. He obtained a little delay in the execution of the order; but in February, 1855, he quitted Africa, and their Lordships are not aware of any evidence to show that he has since been engaged in such transactions. In 1854 he obtained from the Portuguese Government a concession of large copper mines in Africa, which he began to work in 1855, and Sir George Jackson states that he has no reason to suppose that Garrido (the agent of Flores, who remains in Africa), has, since those mines began to be worked, been at all concerned in the traffic of slaves. Unless the evidence of Monteiro be considered sufficient to establish the fact, there seems no distinct proof that, in or after the year 1854, Flores embarked in any adventure in slaves.

Nature of proof
required to sup-
port a sentence
of condemna-
tion.

In order, however, to establish a case against this shipment, it is not sufficient to show that Flores had been engaged in the slave-trade, and had not altogether abandoned it in 1854. It must be proved either that at that time he had no lawful trade, or that, from the port to which the cargo was addressed, or from the nature of the cargo itself, or from other circumstances, there is a presumption that this adventure was intended, not for his lawful traffic, but for his unlawful traffic. Now, not only are the propositions as to Flores' trade, and as to the port of consignment, and the nature of the cargo, not established, but the direct contrary is distinctly proved by the evidence; and so far from there being proof of any other circumstances to raise the presumption, the evidence tends directly to rebut it. It is proved that Flores was engaged in lawful traffic to a large extent; his dealings of this kind increasing, as it seems, in proportion as the slave-trade was suppressed. He had much correspondence with Pinto, Perez & Co., and received several consignments from them in the years 1854 and 1855. This correspondence is produced, and it all appears to bear reference only to lawful trade. Some

Consignee not
known to be at
the time en-
gaged in the
slave-trade.

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of the articles ordered by him are such as could hardly be employed for any but lawful trade; one is a brick-making machine; another is an oil-press, which he proposes to establish for crushing ground-nuts, an article which seems to have acquired considerable importance in commerce since the great check given to the slave-trade upon this coast. With respect to the port of Ambriz, the witnesses on both sides agree that, at the date of the transactions in question, it was a port at which considerable lawful traffic was carried on; at which there were respectable European houses established for the purpose of carrying on such traffic; at which a cargo like that of the Newport might find a sale for the purposes of lawful traffic, and at which a legitimate cargo might be procured in return; and it is shown that for several years Flores himself had been in the habit of importing palm oil, elephants' teeth, and other African produce, from Ambriz into Loanda. If, therefore, the real employment of Flores had been notorious in London, and known to these parties, how could it have affected their case? It never can be contended that, because a man has been engaged in the slave-trade, he must not engage in lawful trade, or that all persons dealing with him must be presumed to be engaged in illegal traffic. The policy of the British Government appears to have been directed, on the contrary, to supplanting the slave-trade by lawful commerce, and to inducing those who had been engaged in it, whether buyers or sellers of slaves, whether natives of Africa or foreigners, to abandon their old pursuits, and employ themselves and their capital in promoting the lawful commerce, and with it the civilization of the country. But, so far from the characters of Flores and Garrido being notorious in London, and known to all merchants there engaged in the African trade, not a single merchant, or other person resident in England, is produced as a witness on the part of the Crown to prove the fact, and there is much evidence the other way. Mr. Swanzy, who has been engaged in the African trade for twelve years, swears that he had never heard either of Garrido or Flores. Mr. Williams, who was formerly a partner in the firm of Pinto, Perez & Co., who knows all their transactions as well, he says, as they know them themselves, and is still in some measure connected with the firm, swears that he never heard of Garrido, and never heard of Flores being engaged in the slave-trade, or even that he was suspected of being so, till after the seizure of the Newport. Mr. Banner, who has been engaged, for about fourteen years, as a ship-broker, in trade with the west coast of Africa, states that he had never heard, nor had the least suspicion, till after the seizure of the Newport, that

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Cargo not
proved to be
intended for
unlawful pur-
poses.

Flores was engaged in the slave-trade. Slader, a clerk of Banner, deposes to the same effect, and so do Pargana and Boyd, who are clerks of Pinto, Perez & Co. One of the firm of Le Sueur & Co. has been examined, and he states that he had never heard of either Flores or Garrido; and he denies in the most positive terms, that he, or any of his firm, or his ship, since she belonged to them, has been ever engaged, directly or indirectly, in the slave-trade, and he says that the whole transaction of chartering the ship on her last voyage was conducted by Banner & Co. This statement is confirmed by Banner, who states that he had chartered the Newport twelve times between 1845 and 1854, upon African voyages, sometimes on account of the British Government, and sometimes to private persons. He states that on the late occasion, the ship was chartered and the cargo shipped solely for the purposes of lawful commerce. The partners in the firm of Pinto, Perez & Co. have sworn to the same effect; and have also sworn that, until after the seizure of the Newport, they had no notice, knowledge, or suspicion, that Flores was, or had been, engaged in the slave-trade. If we look at the *evidentia rei* in the particular transaction, not the least circumstance of suspicion is discovered. It is clear, from the depositions of the Crown witnesses, as well as of those of the Appellants, that the cargo was of a character quite as well suited for lawful as for unlawful traffic. The staves are proved to have been second-hand staves, furnished by breaking up casks which had brought home palm oil, and to have been bought for the purpose of being so employed again, and not to be fit for carrying water. So little interest was felt about them by the shippers, that the master was told, if he was pressed for room in his ship, to leave them out. No blame is to be imputed to either the owners of the ship or the shippers of the cargo for giving no bond in respect of them. It is, at least, very doubtful whether any bond could have been demanded; but, at all events, it was not demanded. The Custom-house officer who passed the goods says he should not have required a bond if he had observed them; "indeed, he has no doubt that he did observe them, but required no bond—not, according to his then judgment, considering such bond to be requisite." From the evidence of all the Custom-house officers examined, it appears that the practice amongst them varied with respect to requiring such bonds, and, if there was any mistake in the matter, the allegation on the part of the Crown attributes it "to the error or neglect of the Custom-house officers on the spot." With respect to the demijohns, it is proved that they are common articles of commerce in the

African trade; that they are not used for carrying water in slave ships, for which purpose they occupy too much room, but are used for carrying spirits into the interior of Africa: indeed, the evidence shows that it had been intended to fill these vessels with spirits on the voyage in question, but that on applying to the Custom House, it was found to be illegal to do so. When it is admitted that this ship was never intended to be employed in carrying slaves, and that the whole cargo was to be sold, and that these articles were part of the cargo, and not of the equipment of the vessel, no suspicion can attach, after the evidence is examined, to any of these articles. The *bona fides* of the transaction is strongly confirmed by the other circumstances which appear in the case. The letters of Flores and Garrido show incidentally that Flores was employed in 1854 in procuring return cargoes in Africa for the ships which he was expecting from England. Insurances upon such ships and cargoes were effected to the amount of 20,000*l.*; and amongst all the letters which have been produced, not one is pointed out containing any expression from which an inference of illegal traffic can be drawn.

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The result is, in their Lordships' opinion, that the Respondents have entirely failed, by the additional evidence, to bring home any charge either against Le Sueur & Co., or Pinto, Perez & Co., with respect to the shipment in question, and that, on the contrary, the effect of such evidence is to exonerate these gentlemen entirely from any guilty knowledge of an illegal purpose, even if there were reason to believe that, on the part of Flores, such purpose existed. Indeed, as against Le Sueur & Co. the allegation on the part of the Crown does not impute to them any such knowledge. The sentence complained of must be reversed. Le Sueur & Co. have been subjected to serious loss; their ship has been sold, they have lost their return freight, the seizure was made without any sufficient cause, and they are clearly intitled to restitution, with costs and damages. If the captors have acted under the instructions of their Government, it is to the Government that they must look for their indemnity. Pinto, Perez & Co. have been condemned in very heavy penalties, on the ground of having committed an offence which might have subjected them, in this country, to a prosecution for felony. Whatever injury, however, they have sustained (and it may probably be, as they represent, very serious), it is not of a character for which damages can be awarded in a Court of Admiralty; but

Case against the shipowner and the shippers fails entirely. Shipowners entitled to restitution, with costs and damages; shippers to remission of penalties and costs, but not damages.

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to the costs of all the proceedings, both in St. Helena and in this country, they are fully intitled.

Their Lordships desire to guard themselves against being supposed to imply, by this judgment, any censure of the course which it has been thought proper on the part of the Crown to adopt in this case. When the attitude assumed by this country towards foreign states, on the subject of the slave-trade, is considered, it may justly have been thought the duty of the British Government, when their own subjects were alleged to be implicated in such a traffic, to have the matter sifted to the very bottom, and not to spare, as they appear not to have spared, any trouble or expense in order to discover the guilt, if guilt existed, and to bring the offenders, if offenders they were, to justice. This course may have been necessary, as it was strongly urged by the Attorney-General that it was necessary, for the vindication of the national honour in the eyes of the world; but their Lordships think that the national honour must be vindicated at the national expense, and that merchants who, having engaged only in a lawful adventure, have been subjected to an unjust and illegal sentence, are entitled to be indemnified against its consequences, and against the costs which they have incurred in obtaining its reversal, in relieving themselves from the heavy pecuniary loss which it inflicted, and from the deep stain which it cast upon their characters.

Consignee of cargo to restitution of cargo, but not in the circumstances to costs.

The only remaining question, is with respect to the cargo. The penalties, for which alone it was held in deposit, being no longer due, in consequence of the reversal of the sentence against Pinto, Perez & Co., it is of course that the cargo should be restored to Flores, the owner, unless a case for penalties, or condemnation, can be established against him. Their Lordships have already expressed their opinion that the respondents have failed to establish any such case, even if, on the present proceedings, it was competent to them so to do. The cargo, therefore, with the proceeds of such part as has been sold, must be restored to him; but, considering that he has not availed himself of the opportunity which he had of exculpating himself, by his own affidavit or examination (as J. M. Perez, his attorney, has attempted to do on his behalf), from all guilty intention in this transaction, and that his course of trade previously exposes this particular adventure, as regards him, to some suspicion, their Lordships think that justice will be done to him by simple restitution of the cargo, and of the proceeds of such part

as has been sold, without costs or damages. They will make a report to her Majesty in conformity with the opinion which they have expressed.

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Bowdler and *Bathurst*, proctors for the Appellants.

Dyke, proctor for the Respondents.

THE NEWPORT (a).

(REPORT OF THE REGISTRAR TO THE JUDICIAL COMMITTEE
OF HER MAJESTY'S PRIVY COUNCIL.)

*Ship—Condemnation and Sale by Decree of Vice-Admiralty
Court—Reversal of Decree with Costs and Damages—Mea-
sure of Damages.*

The capture of a chartered ship, and condemnation and sale by decree of a Vice-Admiralty Court do not, if the decree is reversed by the Court of Appeal (although more than three years afterwards) with costs and damages, amount to a prevention by the perils enumerated in the charter; but the shipowner is bound to perform his contract or to pay damages.

A shipowner has no claim to freight *pro rata itineris peracti*, except there be an acceptance of the goods by the shipper at the shorter destination, such that the law will imply a new agreement for freight *pro rata*.

Under a decree of restitution with costs and damages, a shipowner is intitled to recover damages: (1) for loss of chartered freight; (2) for liabilities incurred for non-performance of his charter (or cost incurred by final performance thereof); (3) for interest upon the amount recovered from the probable date of the termination of the chartered voyage (supposing there had been no capture) up to the date of payment. But he is not intitled to recover for estimated profits from the employment of the ship subsequently to the chartered voyage.

A ship was chartered from London to Ambriz and back, to carry out goods and bring back a return cargo; "on being paid freight as follows, viz.: for the whole reach and burthen of the said vessel's hold from bulkhead to bulkhead, for the voyage out and home as herein stated, the sum of 900*l.* sterling, in full, together with ten guineas gratuity to the master for his satisfactory attention to the cargoes, payable as follows, viz.: 400*l.* sterling in cash on ship sailing from London, ship lost or not lost, and the remainder on correct delivery of the return cargo, less three months' discount on half the amount (the act of

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God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage whatsoever excepted); the freight to be paid on unloading and right delivery of the cargo as above stated." The ship sailed, and on the 21st of September, 1854, arrived at Ambriz, when she was immediately captured as engaged in the slave trade, and taken to St. Helena. On the 20th of November, 1854, the Vice-Admiralty Court at St. Helena condemned the ship as lawful prize, and the shippers of cargo in penalties. The ship was thereupon sold, and the cargo, which was retained for payment of the penalties, unladen and warehoused. The decree was appealed to the Privy Council, and on the 3rd of February, 1858, reversed, with costs and damages to the shipowner, but without costs or damages to the owner of the cargo. The amount of the shipowners' damages was referred to the Registrar of the Court of Appeal and the merchants; they reported that he was intitled to recover from the captors (1) the value of his ship at the time of capture; (2) 400*l.* as an equitable amount of damages for which he was liable to the freighters for non-performance of his charter; (3) the balance of chartered freight unpaid, less charges; (4) interest upon the entire amount, from the 1st of January, 1855, the probable date of the termination of the return voyage, until the day of payment; but they refused to allow for anticipated profits which might have been earned by the ship subsequently to the chartered voyage, or (under the circumstances) for surplus stores and provisions which might have remained on the termination of the voyage.

IN this case the following special report was given to the Judicial Committee of her Majesty's Privy Council by the Registrar of the Court.

"Both the proctors in the cause having requested me to state in writing the grounds upon which my report in this case is founded, I proceed to do so.

Part of the
case.

The circumstances of the case, so far as they are necessary for the present purpose, are briefly as follows:—

The *Newport*, a vessel, whose owners, Messrs. Le Sueur, reside in the island of Jersey, was chartered in the early part of 1854 by Messrs. Pinto, Perez & Co., to carry out a cargo from London to Ambriz, on the west coast of Africa, and to bring back a return cargo to this country. The freight payable for the voyage out and home was 900*l.*, of which 400*l.* was to be paid on the ship sailing from London, the remainder on safe delivery of the return cargo. The ship sailed from London on the 9th or 10th of June, 1854, and on the 21st of September following arrived off the port of Ambriz, when she was immediately taken possession of by H.M.S. *Philomel*, and was despatched to St. Helena for adjudication. Proceedings having been instituted against her in the Vice-Admiralty Court of that

place, the Judge on the 20th of November, 1854, pronounced the ship to have been, at the time of the seizure thereof, engaged in the slave trade, condemned her as a lawful prize; and further condemned Messrs. Pinto, Perez & Co., the shippers of the cargo, in penalties to the amount of double the value of the cargo. From this decree an appeal was prosecuted to her Majesty in Council, and on the 3rd of February, 1858, the Lords of the Judicial Committee were pleased to report to her Majesty their opinion that the decree of the Court below should be reversed, that the ship should be restored with costs and damages, and the cargo should be restored, but without costs or damages, to Senor Flores, the owner or consignee thereof, on whose behalf it had been claimed in the Court of Appeal. In the mean time, however, in pursuance of the decree of the Court below the cargo had been unladen and warehoused, the ship had been sold, and the proceeds paid into the registry of the Vice-Admiralty Court of St. Helena. And the question, which has been referred to me and the merchants by whom I am assisted, is, what is the amount of the damages to which the owners of the ship are intitled for the illegal capture and detention of their vessel. There is no question as to the owner of the cargo, as damages have not been given to him by their Lordships.

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Question to be decided; the amount of damages to be awarded to the shipowner.

A claim has been brought in on behalf of the owners of the ship, and I will proceed to consider the several items of that claim in order.

I. The first point in dispute between the parties was as to the value of the Newport at the period of the capture. It appears that the Newport was a vessel of 126 tons register, and that she was built at Jersey, in 1837, and classed A 1 for five years. She had consequently lost her character in 1842. It further appears that she was purchased by the Messrs. Le Sueur, her owners, in 1845, for 700*l.*; and they state that they had immediately expended upon her the sum of 342*l.* 6*s.* 8*d.* in repairs, that they had subsequently expended further considerable sums upon her, and that in the summer of 1853 they had thoroughly repaired her at an expense of 339*l.* 16*s.* 3*d.*, and that she was worth *to them* at the time of the capture 1,200*l.* It was stated in reply, on behalf of the captors, that a vessel of the size, build and character of the Newport, built in 1837, would, in the year 1854, even if then newly coppered, be worth only 4*l.* a ton, or 504*l.* It appeared, however, that she had been sold at St. Helena for

As to value of ship,

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to be determined by value at the time of capture.

As to chartered freight.

Terms of charter, 400*l.* prepaid, lost or not lost.

Opinions of counsel taken.

688*l.* The merchants, by whom I was assisted, were of opinion that her extreme value at the period of the capture was 7*l.* a ton, and consequently I allowed it at that rate, or at the sum of 882*l.*

II. The next point in dispute was as to the sum of 400*l.*, which, as has been said, was advanced by the charterers on account of freight, previous to the departure of the vessel from the port of London. The owners of the ship alleged that they were now bound to repay this sum to the charterers, and they consequently claimed to recover it from the captors. And it is clear that if they are so bound, they can of course recover it from the captors, as damages immediately arising out of the capture. Now the terms of the charter-party, so far as it relates to this part of the subject and to the advance of the 400*l.*, are as follows:—"On being paid freight as follows: viz. for the whole reach and burthen of the said vessel's hold, from bulkhead to bulkhead, for the voyage out and home as herein stated, the sum of 900*l.* sterling, in full, together with ten guineas gratuity to the master for his satisfactory attention to the cargoes, payable as follows: viz., 400*l.* sterling in cash on ship sailing from London, ship lost or not lost, and the remainder on correct delivery of the return cargo, less three months' discount on half the amount (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever during the said voyage always excepted). The freight to be paid on unloading and right delivery of the cargo, as above stated." The question as to whether the owners of the ship were liable to repay the 400*l.* to the charterers appeared to me to be one of so much difficulty, that I requested that the opinion of counsel should be obtained by both sides on the subject. Accordingly, two opinions have been obtained, the one from Mr. Tomlinson, on behalf of the owners of the ship, the other from Mr. Bovill, on behalf of the captors. Mr. Tomlinson is of opinion that the Messrs. Le Sueur, the owners of the ship, are bound either to repay the 400*l.* so advanced, or to complete their contract by engaging another ship to carry on the cargo from St. Helena to the coast of Africa, and to bring back a return cargo to this country if required so to do by the charterers. Mr. Bovill, Q.C., on the other hand, is of opinion that Messrs. Le Sueur cannot be compelled to do either the one or the other, that they are not bound to repay the 400*l.* so advanced to them, nor to carry on the cargo as suggested. The cases cited by Mr. Tomlinson, in

support of his opinion are *Shipton v. Thornton* (a) and *Rosetto v. Gurney* (b). Neither of these cases, however, it appears to me, goes to the full extent contended for by the learned counsel; they merely show that, if from any circumstance the ship is unable to continue her voyage to the final port of destination, the master is *at liberty*, with a view to earning his full freight, to tranship the cargo into another vessel, and to carry it on to its port of destination; but this, as I will presently show, is not quite the point at issue in this case. The two cases cited by Mr. Bovill, *De Silvale v. Kendall* (c) and *Hicks v. Shield* (d), are in point, so far as they go. They prove that an advance on account of freight, made in pursuance of a charter-party, cannot be recovered back by the merchant if the ship is subsequently lost, unless there be an express provision to that effect in the charter-party. But these two cases differ in one very material respect from the present one. In both those cases the ships and cargoes were wholly lost to their owners, the one by capture, the other by shipwreck: and I am quite ready to admit that, if the Newport and her cargo had been wholly lost to her owners, either by shipwreck, or possibly even by final condemnation to the captors, the 400*l.* could not have been recovered by the charterers, the case would have fallen within the exceptions enumerated in the charter-party. But in the present case the ship was not only not lost to her owners, but was restored, and restored to them too with costs and damages; and the question to be determined is, whether the circumstances of the capture, detention, or even the subsequent sale of the ship at St. Helena, are sufficient to operate a dissolution of the original contract between the parties, or whether, looking to the subsequent restitution of the property with costs and damages, they are to be regarded as amounting only to a temporary restraint, and whether the owners of the Newport were not, on their property being restored to them, bound to provide a suitable ship to carry on the goods to Ambriz, and to bring back a return cargo to this country if required so to do by the merchant.

I will suppose that the Newport had, shortly after her arrival at St. Helena, say a week, or a month after, been restored by the Vice-Admiralty Court, and that the cargo had never been discharged from her, there can, I think, be little doubt that she would in that case have been bound to fulfil her contract, by carrying on the cargo to the coast of Africa, notwithstanding

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Cases cited by
Mr. Tomlinson.Cases cited by
Mr. Bovill.The contract
was not dis-
solved by the
capture or de-
tention,

(a) 9 A. & E. 314.

(b) 11 C. B. 176.

(c) 4 M. & S. 37.

(d) 7 E. & Bl. 683.

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sale of the ship.

her capture and forcible deviation from the voyage. Again, suppose that after the property had been condemned by the Vice-Admiralty Court at St. Helena, and until the reversal of that decree by the Superior Court, the vessel had remained at St. Helena with her cargo on board, I apprehend there could be no question that the shipowner would still have been bound to fulfil his contract, if so required by the charterers, notwithstanding the forcible detention of the ship at St. Helena. And I cannot see what distinction it makes that the cargo has in the meantime been discharged, and the ship been sold by the superior authority of the Court, and on the application of the captors. If the forcible sale of the ship compels the shipowner to purchase or hire another ship to enable him to fulfil his contract, and thus subjects him to heavier expenses, he has his remedy over against the captors, as his ship or the value thereof has been restored to him with costs and damages; but it does not, it appears to me, release him from the performance of his contract with the charterers. I do not see how the capture, detention, or even the sale of the Newport can be considered as amounting to more than a temporary restraint, on the removal of which the shipowner was bound to fulfil his contract, and on his neglecting or refusing to do so, the charterers would have a right of action against him.

Cases in support
of this
view.

In support of this view, I will refer to two cases, which bear a close resemblance to the present one. The first is that of *Gosling v. Higgins* (a). In that case the charter was to carry from Madeira to Jamaica, and thence to London. The cargo was seized for a supposed violation of the revenue laws, and condemned, but the sentence was afterwards reversed on appeal. In an action by the freighters against the owner of the ship for loss of the goods by the seizure, Lord Ellenborough, before whom the case was tried, ruled that they were intitled to recover, saying that the shipowner had his remedy over against the officers. The other case is that of *Spence v. Chodwick* (b), where the facts were somewhat similar, and where it was held in an action by the freighters against the shipowner, that a seizure by Custom House officers was not a "peril of the sea," and (in the absence of any allegation that the freighters were to blame) formed no answer to the action for non-performance of the charter. But the case that has the most important bearing upon the present is that of *Hadley v. Clarke* (c), which was

(a) 1 Campb. 450.

(b) 10 Q. B. 517.

(c) 8 T. R. 259.

an action by the freighters against the shipowner. The charter was to carry from Liverpool to Leghorn. The ship left Liverpool, and on the 30th June, 1796, put into Falmouth to wait for convoy. On the 27th of July following, an embargo was issued against all ships bound to Leghorn; and the ship remained at Falmouth until the month of August, 1798, when, by permission of the government, but without the consent of the freighter, she returned to Liverpool, and discharged her cargo, which the freighter at length consented to receive, but without prejudice to the question, whether, under the circumstances of the case, the shipowner was excused from the non-performance of the contract. On the 24th of October, 1798, more than two years after it had been imposed, the embargo was taken off, and the freighter called upon the shipowner to perform his contract. This the latter refused to do, and in an action by the freighter to recover the amount paid by him for the insurance of his goods for the voyage, he obtained a verdict for the full amount. The right of the plaintiff to recover was afterwards solemnly discussed in the Court of King's Bench; and the Court was of opinion that the embargo being only a temporary restraint did not, notwithstanding the delay, dissolve the contract between the parties, and that the plaintiff had a right to recover. The principles then to be deduced from this case appear to me to be these, that if a shipowner has contracted to carry a cargo, and is prevented from so doing by an embargo or other temporary restraint, he is bound, on the restraint being removed, to fulfil his contract, if required so to do by the freighter, although the restraint may have been continued, as in the case of *Hadley v. Clarke*, for a period of more than two years; and that, if he neglects or refuses to do so, the freighter may recover damages.

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For the reasons, therefore, that I have given, and on the authority of these cases, I am inclined to hold that the circumstances of the capture, detention, and even sale of the Newport, amount to a mere temporary detention; that they do not fall within the exceptions specified in the charter-party, and that the shipowner was bound on his property being restored to him to fulfil his contract, by furnishing a suitable ship to carry on the cargo to Ambriz, and to bring back a return cargo to this country, if so required by the charterers; and on his failing to do so, that the charterers have a right of action against him.

The shipowner was bound to fulfil his contract, or pay damages.

I now come to a point which was very strongly insisted upon at the reference, namely, that a shipowner is intitled to a part payment of freight *pro ratâ itineris peracti*. It was said that

Is the shipowner intitled to retain the

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freight pre-
paid as *pro rata*
freight earned?

the Newport had in fact arrived at Ambriz, her outward port of destination, when she was captured and taken to St. Helena; that the 400*l.* advanced was for the outward freight, and that consequently the shipowner has earned it, and is intitled to retain it as a payment *pro rata itineris*. That a shipowner is sometimes intitled to freight *pro rata itineris* cannot be denied; there are numerous cases in point to prove this; but in all these cases it will be found that he is only intitled, if the charterer *accepts* the goods at the shorter destination. The transaction would seem to be this:—The shipowner, who is at liberty with a view of earning his full freight, to carry on the goods to the ultimate port of destination, offers to deliver them up, and the freighter accepts them, at the shorter destination: the shipowner cannot compel the freighter to accept them, nor can the freighter compel the shipowner to deliver them up, at the shorter destination; it is a mutual arrangement between the parties, substituting a new agreement in place of the original contract. But of such acceptance, in the present case, there is no evidence; the fact, as was urged, that the owner of the cargo has claimed his goods, and has had them restored, is no such acceptance as is here meant; he receives his goods, as the plaintiff did in *Hadley v. Clarke*, subject to all claims for damages, which he may have against the shipowner. I doubt whether anything short of a dissolution of the original contract by mutual consent, plainly evidenced, would now be held to be a sufficient answer to the charterers' action for damages for breach of contract.

There has been
no acceptance
by the freighter
at the shorter
destination, so
as to imply a
new contract of
pro rata freight.

The contract of
charter has
been dissolved
by agreement
on terms of the
repayment of
the freight pre-
paid:

looking to all
the circum-
stances this sti-
pulation fur-
nishes an equi-
table measure
of damages,

But what it may be asked then has been the course of the transaction between the parties? Have the charterers or freighters required the shipowner to carry on the cargo from St. Helena to Ambriz? And have the latter refused to do so? or have the parties mutually agreed to dissolve the contract between them, and on what terms? The only evidence we have on the subject is to be found in the affidavit of Mr. José Maria Perez, sworn the 19th of June, 1858, from which we learn that the parties have mutually agreed to dissolve the contract between them, the charterers relinquishing their right to compel the owners of the Newport to carry the cargo from St. Helena to Ambriz, on condition that the latter repay to them the 400*l.* which they have received. It is a mutual arrangement between the parties, substituting a new agreement between them; and the question to be considered is, whether this agreement is so manifestly inequitable as to lead to a presumption that it had been entered into merely to defraud the captors, and that the latter ought not therefore to be bound by it. To determine how far this agreement is equitable, it will be necessary to consider

what means the Messrs. Le Sueur had of carrying out their contract, had the charterers insisted upon its fulfilment. Looking to the character of the place, to the almost total absence of any trade from St. Helena to the west coast of Africa, and to the constantly prevailing trade winds, there can, I think, be little doubt that the best mode of getting the goods conveyed from St. Helena to Ambriz, would have been to have sent out a ship expressly for the purpose to that island. And I would ask, looking to the amount of freight agreed to be paid in the present case, whether a ship could possibly have been obtained for that purpose for less than 400*l.*? Whether the captors would have preferred to pay the expenses attending the hire of a ship to convey the cargo from St. Helena to Ambriz, or whether they would not rather have compromised the matter for the sum of 400*l.*? I think there can be but one answer to this.

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It may, perhaps, also be not altogether unimportant to observe that in the case of *Hadley v. Clarke*, the measure of the plaintiff's damages for breach of the contract was the sum paid by him for the insurance of his goods, the only disbursement which he appears to have made. So, in the present case, the 400*l.* advanced, may fairly be taken as a measure of the damages due to the charterers for non-fulfilment of the contract.

On all these grounds, therefore, I hold that the Messrs. Le Sueur are intitled to recover from the captors this 400*l.*, not as a repayment of freight advanced, but as damages justly due by them to the charterers for non-fulfilment of the charter-party. I hold that the charterers could have claimed the fulfilment of the contract, and that the Messrs. Le Sueur, in compromising that claim for 400*l.*, took the best course for their own and the captors' interests.

and the ship-owners are therefore intitled to recover such damages from the captors.

III. The next item on which there was some discussion was the balance of freight and the gratuity to the master, amounting to 510*l.* 10*s.* It is clear that the balance of the freight was lost to the shipowner by the capture and detention; he will consequently be intitled to it, less certain expenses which would have been necessarily incurred in earning it. These are three months' discount on half the amount, in accordance with the terms of the charter-party, provisions and other payments on the coast of Africa, and inward charges in this country. These we estimate altogether at the sum of 44*l.* 14*s.* 6*d.* We have therefore allowed this item at 465*l.* 5*s.*

The ship-owners are also intitled to recover from the captors the balance of chartered freight, less charges.

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Nothing can be
allowed for sur-
plus stores,

IV. The next item is a sum of 50*l.* as the estimated value of the stores and provisions that would have remained at the conclusion of the voyage on the ship's return to this country. Looking at the small quantity of provisions she seems to have had on board when she was sold at St. Helena, and to the improbability that she would have had any large surplus stock of provisions at the termination of the voyage, we cannot allow this item. If any stores and provisions remained at the end of the voyage, they would be included in the value allowed for the ship.

nor for antici-
pated profits
from the em-
ployment of
the ship.

V. Item No. 14, for the loss of the ship's employment from the period of the capture to the end of 1857, amounting to no less a sum than 806*l.* 3*s.* 6*d.*, cannot, on any consideration, be allowed. It is a claim not for losses sustained, but for anticipated profits, which might possibly never have been made. The case of the *Levin Lank* (a) has decided this point.

Interest at 4
per cent. al-
lowed from the
probable termi-
nation of the
return voyage
to the date of
payment.

Lastly. We shall allow interest upon the amount allowed from the 1st day of January, 1855, that being the time when it may fairly be apprehended that the return voyage would have ended, until the day of payment; and as there is no reason in the present case to deviate from the ordinary rule, we shall allow it at the rate of four per cent. per annum.

H. C. ROTHERY, H. M.'s Registrar."



In the High Court of Admiralty.

THE N. R. GOSFABRICK.

Foreign Ship—Necessaries—Money advanced—3 & 4 Vict.
c. 65, s. 6.

A foreign ship cannot be sued (under 3 & 4 Vict. c. 65, s. 6) for money advanced to the master to enable him to come out of gaol, where he was imprisoned for a debt incurred for necessaries supplied to the ship.

Butcher's meat is a necessary within the meaning of the statute.

Semble, a party supplying necessaries to a foreign ship, and taking a bill in payment, is intitled, if the bill is dishonoured, to sue the ship for the original debt.

April 29.

THIS question arose on the admission of an act on petition, in which N. S. Lotinga, of Newcastle-upon-Tyne, claimed from the foreign brig, N. R. Gosfabrick, a sum of money, alleged to have been advanced for necessaries.

Phillimore, Q.C., for the owners.

Deane, Q.C., for Mr. Lotinga.

(a) Ante, p. 45.

The brig arrived in the river Tyne in December, 1857, and remained there till the 14th January, 1858, during which time Arkley, a butcher of Newcastle, supplied the vessel with meat and other necessaries to the amount of 27*l*. Arkley, being unable to obtain payment, sued the master and lodged him in Newcastle gaol. The master sent for Lotinga, an insurance broker, who, at his request, paid Arkley for the necessaries supplied and for costs incurred, a sum of 37*l*. The master drew a bill of exchange in favour of Lotinga on his owners, which was dishonored, whereupon Lotinga arrested the brig and commenced the present suit.

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DR. LUSHINGTON:—I am of opinion that the meat, &c. supplied falls strictly within the term “necessaries,” and the amount due for them might have been recovered by proceedings against the ship; but there is a broad distinction between the circumstances of the present case and those of ordinary suits for necessaries supplied to ships. If Arkley was suing, I am by no means clear that he would be deprived of his remedy against the ship, because he had chosen to arrest the master, and because he had taken a bill of exchange; for the necessaries would still remain unpaid for. But here the case assumes a very different aspect: the necessaries have been paid for, and this is a claim for money advanced to discharge a debt incurred for necessaries. The 3 & 4 Vict. c. 65, s. 6, introduced a novel proceeding, the principal reason for which was the almost impossibility of foreign ships, in distress off the English coast, procuring such necessaries as anchors and cables; and I must take care not to go beyond a fair construction of the Act, for the Court had no original jurisdiction in the subject-matter. In the *Sophie* (a), the money was taken to have been advanced in order to procure necessaries; here it was advanced to pay a debt incurred for necessaries already procured. If the master is to be considered a necessary, it would extend the remedy to money advanced to get him out of prison for debts howsoever contracted, but that can never be the meaning of the section. I am of opinion that in the *Sophie* I went to the utmost extent I was at liberty to go, namely, in pronouncing for money advanced in order to procure necessaries then wanting. I must reject the petition with costs.

3 & 4 Vict. c. 65, s. 6. Money advanced to discharge a debt incurred for necessaries is not within the statute.

Stokes, proctor for Mr. Lotinga.

Shipwith for the owners.

(a) 1 W. Rob. 368.

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May 7.

THE WILLIAM, M'PHEE, *Master*.

(ON OPPOSED MOTION.)

*Ship—Master and Sole Owner—Bottomry Bond—Wages—
Priority—17 & 18 Vict. c. 104, s. 191—Costs.*

A master, being sole owner, having given a bottomry bond, binding himself, ship and freight, cannot claim his wages to the prejudice of the bondholder. The costs of the master will not be allowed out of the proceeds.

THIS was a claim on behalf of the master and sole owner of the William for wages due to himself, and other disbursements, which was opposed by the holder of a bottomry bond on the ship and freight.

The ship had been arrested in December, 1857, in an action entered by the bondholder against the ship only; that action proceeded *in pœnam*, and the vessel had been sold, the net proceeds being 837*l.* 18*s.* 4*d.* The master's action was entered in February, 1858; a separate action was entered on behalf of three seamen, and on the 17th of April the Court pronounced for their wages, amounting to the sum of 144*l.* 16*s.* 4*d.* The amount due on the bottomry bond was upwards of 396*l.* The master's affidavit claimed, first, for himself as master, wages from the 14th June, 1856, to the 17th November, 1857, 192*l.*; secondly, for money advanced by Stephen Hall, of South Shields, at his instance, on the security of the ship, for the payment of certain seamen's wages, 205*l.* 10*s.* 4*d.*; thirdly, for the necessary expenses of Scott Morrison, acting as his attorney, since he, the master, had been thrown into Newcastle gaol in November, 1857, 71*l.* 3*s.*

The affidavit of the holder of the bottomry bond stated that the bond on ship and freight was executed by the master and sole owner in London on the 9th of June, 1857, for 500*l.* and maritime interest of twelve per cent., the money to be paid within forty-eight hours after the arrival of the ship at Newcastle; that a part of the money due was paid to the then holder on the ship's arrival at Newcastle, but that she put to sea from that port without the knowledge or consent of the bondholder and without payment of the balance.

Spinks, for the master, admitted that he could not press the second and third items of the claim, but contended that the fact of his being sole owner as well as master could be no bar to his title to wages earned in the latter capacity. The 191st section of the Merchant Shipping Act, by which the master has the same right in regard to suing for wages as the mariner, is very general in its terms.

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Deane, Q.C., for the bondholder.—The question is, whether the sole owner acting also as master, and having granted a bottomry bond, can recover his wages to the prejudice of the bondholder. Originally the master could not maintain a suit for his wages in this Court against the ship; his contract was with the owners of the ship,—he had given credit to them. Here the master, being also the owner and insolvent, such a claim as the present is in effect a suit by his simple contract creditors to get his wages paid out of the proceeds, that they may have so much of their debts paid in prejudice of the right of the bondholder; for, looking at the net proceeds of the sale of the vessel, and the claims upon her, the bondholder will take nothing if the present claim of the master is allowed. As to the present Merchant Shipping Act, it will be observed that immediately following the general words referred to, are these words, “so far as the case permits.” The master is, in fact, here suing himself.

DR. LUSHINGTON:—The person on whose behalf this motion is made is the master and sole owner of a British vessel belonging to the port of Auckland, in New Zealand: he claims for wages due to himself, for wages of certain seamen advanced by a third party and interest thereon, and for a debt due to his attorney since he has been in gaol. Now, would these several claims stand considered simply by themselves, if there was no bottomry bond? The master would be intitled to his own wages; as to the money advanced as wages to the seamen, if, subsequent to the arrest of the ship, the master had paid or induced another person to advance them without the authority of the Court, he could not now come against the proceeds of the vessel; as to the third item, the Court would have rejected it altogether; it has no power or authority to interfere in such a matter. So, in point of fact, the only question is, whether, under the circumstances, the master is intitled to his own wages as against the unpaid holder of the bottomry bond of 9th of June, 1857. There are two points: first, whether the master, being also sole owner, and having executed a bottomry bond, is not debarred from carrying on a claim for wages in opposition to

Judgment.
Facts of the
case.

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The master is,
by the terms of
the bond, a per-
sonal debtor to
the bondholder,

and therefore
the bond must
be satisfied be-
fore his claim
for wages can
be allowed.

the interest of the bondholder; and, secondly, what is the meaning of the 191st section of the Merchant Shipping Act, which gives the master the same remedies for the recovery of his wages as a seaman? Let me consider the bond and its contents.

By the terms of the bond the master binds himself, pledges his own credit, as well as hypothecates the ship; by this he becomes debtor to him who advances the money; he appears in the bond in a double capacity, as pledging his personal credit and hypothecating the ship. Can the master be permitted to say, "I have navigated the ship and earned wages, and will put my claim for those wages in force against the proceeds of the ship, and to the prejudice of the interest of the bondholder, to whom I am a debtor in a double capacity?" It has been said that the master is now on the same footing as to wages as the ordinary mariner; but what is the general course of things with respect to seamen? If advances of money are made during the voyage, or necessities beyond those agreed for by the contract supplied, they are as a matter of course deducted from the wages at the conclusion of the voyage. I think it would be a gross injustice to allow the claim of the master and sole owner for wages, as against the man to whom he is personally a debtor. If the ship only had been hypothecated other considerations might have arisen, but here a preferential payment to the master would be to the injury of his own personal creditor. How it would be upon the statute might also be a matter for further consideration. Dr. Deane very properly called my attention to the words in the section "so far as the case permits;" and it may be that it would be impossible to sanction such a claim of the master in conformity with the Act of Parliament, but the grounds on which I reject the present motion are that the master is a debtor both personally and by the hypothecation of his ship.

The Court decreed the costs of the bondholder to be paid out of the proceeds, the master being in gaol for debt, but refused an application for the master's costs out of the same fund.

Crosse, proctor for the master.

Bathurst for the bondholder.



1858.
May 22.

THE GALATEA.

Steam-Tug—Contract for Towage—Salvage Services.

The contract to tow embraces the risk of ordinary bad weather, but is put an end to by weather rendering the completion of the undertaking impossible; and in that case subsequent services may be in the nature of salvage.

THIS was a cause of salvage, promoted by the master, owners, and crew of the steam-tug *Challenge*, against the brig *Galatea*.

On the 24th February, 1858, the steam-tug was hired to tow the brig from Gravesend to the North Foreland for the sum of 15*l*. Early on the morning of the 25th, whilst in prosecution of the voyage, a gale having sprung up, the brig's tow rope broke, and she drifted towards the Tongue Sand. She let go an anchor but, as alleged by the salvors, she was in considerable danger of striking the sand; the tug eventually succeeded in dragging her clear from the sand, and the brig being unable to proceed to the North Foreland, was towed back by the steam-tug to London. The value of the brig and cargo was 11,750*l*.

Addams, Q.C., and *Spinks* for the salvors.

Twiss, Q.C., and *Tristram* for the *Galatea*, submitted that the tug had incurred no risk; that when she took the brig again in tow off the Tongue Sand, the brig was no longer in danger; and that the tug in towing the brig back to London did no more than she was bound to do by virtue of her towage engagement, having regard to the altered state of circumstances.

DR. LUSHINGTON:—I have no doubt as to the principle Judgment. which ought to govern the Court in deciding the present case. When an engagement is made for a steamer to tow a ship from one place to another, the steamer is bound by that engagement to do all that is necessary to facilitate the safe voyage of the ship from the one place to the other; and she is to take the chance of bad weather, which may occasion delay and inconvenience. But she does not take the chance of the undertaking being entirely interrupted by the act of God; that is, from the

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Salvage services may, under circumstances, arise out of towage.

state of the wind and weather being such as to compel her to abandon the original undertaking. In the present case there was an undertaking for the steamer to tow the brig proceeded against from Gravesend to the North Foreland, and when off the Tongue Sand the prosecution of that undertaking was rendered absolutely impossible from the state of wind and weather. The original engagement was then, I hold, no longer binding on the steamer, and I think that she could not be required to tow her back to London as a part of the towage service, instead of proceeding, as originally intended, to the North Foreland. I have always held in cases of this description, and do so now, that when, from the state of the wind and weather, the performance of the service originally contracted for is prevented, a steam-tug is not at liberty to abandon the ship she has engaged to tow, but that it is her duty to render all the assistance in her power in bringing the ship to a place of safety, and that for so doing she is entitled to a salvage remuneration. It is the same with regard to a pilot while on board a ship; he is obliged to remain in the service of that ship, and if anything occurs beyond his ordinary duties as a pilot, he receives salvage remuneration. I entirely acquiesce in the judgment of the Judicial Committee of the Privy Council, the *Jonge Andries* (a), which has been referred to, that it is not every little thing that a man may do on board a ship that is to be construed as a salvage service; but, on the other hand, where pilot duties are construed into salvage services, salvage remuneration is awarded. I am of opinion that the salvage service in this case commenced when from the state of wind and weather it became impracticable to tow the brig to the North Foreland. I do not believe that the steam-tug incurred any danger in the service she rendered to the brig, but I think she rescued her from a position of considerable peril. I award 350*l*.

(a) Ante, p. 303.

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THE THEODORE, R. DITCHBURN, *Master*.

Salvage—Dishonest Agreement.

An agreement dishonestly made by the master of a ship to secure to so-called salvors an excessive reward is not valid against the owner of the ship.

THIS was an action of salvage brought by twenty Yarmouth beachmen for services rendered to the bark Theodore in the following circumstances :—

On the 22nd January, 1858, the master of the Theodore hired the salvors and their yawl for 5*l.* to take him on board his vessel then lying in Yarmouth Roads. They did so accordingly, and found the barque had moved from her former place of anchorage, and was close upon the Hook Buoy of the Scroby Sand, the wind then blowing hard from the N.N.W. Whilst alongside they heard the mate inform the master that the barque had parted from her port anchor and sixty-five fathoms of chain about twenty minutes, that he had given her the other anchor, but that she was driving. They then went on board and entered into an agreement with the master to bring the vessel safe into Lowestoft Harbour for 200*l.*; and thereupon proceeded to lift the anchor with the assistance of the barque's crew, and to make sail: in about three or four hours they brought the vessel into Lowestoft. In the meantime the agreement was reduced into writing and signed; it was in these words :—

“ Yarmouth Roads, 22nd January, 1858.

“ This is to certify I agree to give the boatmen 200*l.* for assistance to the barque Theodore, while drifting on the Scroby Sand, having parted from her anchor and sixty-five fathoms of cable at 5.30 A.M., and assisted my ship up to Lowestoft.

“ RICHARD DITCHBURN, Master.

“ WILLIAM PENSHERWOOD, Mate.

“ HENRY GIBBONS AND COMPANY.”

The owners of the Theodore defended the action, repudiating the act of the master. They alleged that the barque was never in any danger of going on shore; that the master had most improperly and recklessly entered into the agreement, and that

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he had been dismissed by them in consequence. They also pleaded a tender of 50*l*.

Deane, Q.C., for the salvors.

The Admiralty Advocate and *Twiss*, Q.C., for the owners.

Judgment.

DR. LUSHINGTON:—The first question is, whether I am to uphold the agreement entered into between the master and the salvors. If I determine this in the negative, I must then consider whether the tender of 50*l*. is an adequate remuneration for what was actually done.

As to the facts of the case. It cannot be said that the service was one of danger to the salvors. It was not argued that the salvors in leaving the beach and in putting the master on board the barque incurred any peril, or incurred any peril subsequently; although, no doubt, that the weather had been previously very tempestuous, and the wind may, at the time, have been blowing strong. Then was the ship in any danger? It is said on behalf of the owners, that, taking it to be true—and, indeed, it must be admitted—that the barque had lost one anchor and sixty-five fathoms of chain, and was dragging her other anchor, she was, nevertheless, in no danger of going on the Scroby Sand; for by letting out more chain on the second anchor the barque might have been easily brought up, or weighing and making sail, she had a fair wind for Lowestoft Harbour: which, in fact, she afterwards made for. This seems to meet the gist of the case; and, looking to the whole of the evidence, I am of opinion that the salvors have failed to show that there was anything to hinder the barque's crew from taking either of these measures with due effect. In these circumstances the demand of 200*l*. by the salvors is scarcely consistent with any just or fair dealing. Even if their assistance was in some degree serviceable, and—so to speak—requisite, the actual service was not difficult, and lasted only between three and four hours. The Court is very much indisposed to set aside an honest agreement, but it must be satisfied that the agreement is honest. Where there is any doubt its rule is to adhere to the agreement; and the Court would be just as ready, in favour of salvors, to set aside an agreement, if satisfied that it was wholly inequitable. But is not this demand exorbitant? I regret to say on the present occasion,—for the Court is generally anxious to protect the interests of salvors,—that it is an exorbitant demand, and such as no Court of justice would be justified in carrying into effect,

The agreement was dishonest, and must be set aside.

I pronounce against the agreement and for the tender. And
I give costs from the time of the tender.

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Shephard and *Skipwith*, proctors for the salvors.

Brickwood and *Brooks* for the owners.

THE PERLA, ANDIOECHIA, *Master*.

"Necessaries"—3 & 4 Vict. c. 65, s. 6—*Copper Sheathing—Presumption of Liability*.

A liberal meaning is to be attached to the term "necessaries," in 3 & 4 Vict. c. 65, s. 6. Copper sheathing is a necessary.

Where necessaries are supplied for the use and benefit of a foreign ship, the presumption is that the ship is liable.

THIS was an action of necessaries by Messrs. Muntz against the Spanish ship *Perla*. The goods supplied were yellow metal sheathings, rings, nails, &c. The defence for the owners was, that yellow metal sheathing was not a "necessary" within the meaning of the statute 3 & 4 Vict. c. 65; that the goods were supplied to the credit of a Mr. Bell, who had made an agreement with Messrs. Oleaga & Paris, the brokers of the ship, to repair the ship, and if his account should be considered too large, to purchase her for 1,500*l.*; and that if credit was entered on the books of the Plaintiffs to the owners, it was so entered by fraud and collusion between the Plaintiffs and Mr. Bell.

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In support of the claim a clerk of the Plaintiffs deposed that the master of the ship came to the office of Messrs. Muntz in Liverpool, accompanied by Mr. Bell, who introduced him, and (the master not speaking English) gave the order, according to the practice common in such cases; that credit was not given to Mr. Bell, but to the master as representing the owners, and was so entered in the order book, "May 17, 1857. Captain Andioechia, per Mr. Bell, for the *Perla*;" that the alleged agreement between Mr. Bell and the shipbrokers was never shown or mentioned; and that, after the goods were supplied, the bill was sent in to the master under cover to the brokers, headed "Captain Andioechia and owners of the *Perla*." For the Defendants there was an affidavit by Mr. Paris setting out the agree-

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ment, stating that an action had been brought upon the agreement, and damages recovered for the breach thereof, and alleging that according to his (Mr. Paris's) information and belief credit had been given to Mr. Bell, or, if not, that credit had been entered on the books of Messrs. Muntz to the ship by fraud and collusion between them and Mr. Bell. The master also, on being examined, stated that, not understanding English, he did not know what passed between Mr. Bell and the clerks of the Plaintiffs, or that credit was given to the ship; that he went to the office at Mr. Bell's request.

Deane, Q.C., and Robinson for the Plaintiffs.

Addams, Q.C., for the Defendants.

Judgment.

Copper sheathing is a "necessary."

Presumption of ship's liability for necessities supplied to the use of the ship.

DR. LUSHINGTON:—The first question is, whether copper sheathing is or is not a "necessary" to a ship within the meaning of the statute. I am of opinion that it is. It may not be always indispensable, but it is very customary for sea-going vessels to be coppered, and the Court will not put a restricted meaning on the term necessities in this very beneficial statute, so as to confine it to things absolutely and unconditionally necessary for a ship in order to put to sea. The other question is one of fact, namely, whether credit for the sheathing supplied was given to the ship or to Mr. Bell. Where goods are furnished for the use and benefit of a ship, the presumption is that the ship is liable; and, to rebut this presumption, it must be distinctly proved that credit was given to the individual only, whoever he may be. The agreement stated in this case to have been made between Mr. Bell and the brokers of the ship is really not admissible evidence, as there is no proof that at the time of the credit being given it had come to the knowledge of Messrs. Muntz or their servants acting for them, and the contrary is distinctly sworn. Be the agreement ever so binding between the parties to it, it is, as concerns the parties in this cause, *res inter alios acta*. The allegation, or insinuation rather, that credit was entered in the name of the master and owners by fraud and collusion between Messrs. Muntz and Mr. Bell, is utterly unproved, and of course, where fraud is alleged, the Court always requires cogent proof. I pronounce for the claim with costs.

Tebbs, proctor for the Plaintiffs.

Clarkson for the Defendants.

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July 26.

THE JONATHAN GOODHUE, DIBBLE, *Master*.*Bottomry—Cargo not on Board.*

A bottomry bond upon, ship freight and cargo for necessary repairs to the ship, executed after the repairs done and the contract of affreightment, but before actual shipment of the cargo, is invalid as against cargo.

BOTTOMRY.

The *Admiralty Advocate* and *Robinson* for the bondholders.

Twiss, Q.C., and *Spinks* for the owners of cargo.

The *Gratitudine* (a); *Prince George* (b); *Osmanli* (c); and *Conard v. Atlantic Insurance Company* (d) were cited in the argument.

DR. LUSHINGTON:—This is a case of bottomry on ship, freight and cargo. It appears that in November and December, 1856, the American ship the *Jonathan Goodhue*, underwent extensive repairs at Calcutta, and that on the 31st of December the vessel was there chartered by Messrs. Livingston. The charter provided that the vessel, being then about to proceed to Rangoon, should, upon her arrival and discharge at that place, be put at the disposal of the freighters, lade a full cargo of rice, and proceed with the same to a port in the United Kingdom. On the 8th of January, and before the ship sailed, the master gave the bottomry bond now sued upon. The bond recites that the ship was then lying at Calcutta, and that the master was obliged to take up money on bottomry to pursue his intended voyage to Rangoon and thence to England; it then recites the charter with Messrs. Livingston, and purports to bind the ship, the cargo to be laden under the charter, and the freight to become due in respect thereof. The ship sailed to Rangoon, there discharged, and in pursuance of the contract of affreightment, took a full cargo of rice belonging to Messrs. Livingston and sailed to Liverpool, arriving there on the 10th of July, 1857. The bondholders then demanded payment of the bond, and brought their action in this Court. Messrs. Livingston gave an appearance under protest; the owners of the ship did not appear: and on the 18th of September the

Judgment.
Facts of the
case.

(a) 3 C. R. 240.

(b) 4 Moore, P. C. 21.

(c) 7 N. of C. 322.

(d) 1 Peters' Rep. 386.

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Court pronounced for the bond, so far as concerned ship and freight, and the ship was sold. The proceeds of the ship, together with the freight (after deductions) lying in the Registry, amount to 2,221*l.* 8*s.* 2*d.* The bondholders claim 3,040*l.* 17*s.* 6*d.* as due to them upon the bond, and they now pray in their Act on petition that the bond may be pronounced valid as against the cargo. To this Messrs. Livingston answer, that their property was hypothecated without their consent, that they had no interest in the debt for which the money was borrowed on bottomry, and that the bond is not valid in law against the cargo. And the question which I have to decide is, whether the cargo is liable under this bond.

I have never known an instance in which a bond on ship, freight and cargo, pronounced valid against ship and freight, has been held not valid against cargo; but undoubtedly a bond may be good in part and bad in part: all depends on the circumstances of the case. In the present case it is very important that the circumstances, as I have detailed them, should be well understood, for I ground my judgment upon them. I ground my judgment upon the undisputed fact, that the damage to the ship was done and the repairs executed before the charter-party and the bond given before the shipment of the goods, and upon the fact, which I consider clearly proved, that the owners of the cargo did not consent to the giving of this bond. They affirm on oath that they did not consent, and moreover the charter recites that the ship then proceeding to Rangoon was tight, staunch and strong, and every way well-fitted for the voyage.

I am anxious to guard against my judgment being extended beyond the circumstances of the case, because I am aware that bonds in circumstances like the present have in fact been pronounced for. I mean in the case of vessels in the West India trade, meeting with damages on the outward voyage, where bonds have been given on ship and cargo before the cargo was actually shipped. In some of these cases the cargo was contracted for previously, in others it was only insured by the custom of the trade. But these were all undisputed cases. The point now at issue has never been distinctly raised for decision. I have now to give my judgment upon it, and I do so not without much consideration, the more so, as I am informed, that there are other cases of the like kind depending on my decision.

cited for the bondholders. There had been many cases antecedent to that in which bonds charging the cargo had been pronounced for, but no decision whether it was competent for the master so to charge the cargo. The *Gratitudine* proceeds on this principle, that if a cargo has been taken on board for a certain voyage, and damage arises to the ship, the cargo may be made responsible for the completion of that voyage. The master, who is agent for the ship, becomes by necessity and the policy of the law, agent for the cargo, in order to meet the necessity; and he is empowered to hypothecate, for the success of the common adventure, both ship and cargo. The law, so laid down by Lord Stowell, has ever since been followed, and is evidently for the advantage of owners of cargo as well as of owners of ship. But there is no authority for giving a bottomry bond on cargo before it is put on board. It is the necessity of the cargo, and the required completion of the voyage which has been interrupted, which warrant the bond to extend to cargo. I take it to be quite clear that where a ship is lying in her original port, and is in need of repairs in consequence of a former voyage, or in need of necessaries, no bottomry bond can be given on cargo which is not shipped; and that for the obvious reason that the master has no control over the cargo till it is on board the ship. The master is the agent of the ship for many purposes, but he is not the agent of the cargo, except so far as it is thrown upon him by direct contract or by necessity; and it is not till the cargo comes on board the ship, and under his control, that he has the slightest right to interfere or deal with it, directly or indirectly. It appears to me that it would be contrary to principle, and most mischievous, if a valuable cargo lying in a port in this country, having been shipped from the East Indies, was held liable for damage done to the ship before it had been put on board or contracted to be so,—a liability which the owners could not have contemplated their property would be exposed to. Dr. Twiss has said that this Court has no jurisdiction over goods pledged when on land, but I wish it to be understood that I do not decide this case on any point of jurisdiction, but because I am of opinion that the master had no authority in fact or in law to hypothecate the property. I am of opinion that this bond cannot be supported, so far as it affects the cargo, and therefore I must pronounce against that portion of it, with costs.

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July 26.

The master has no authority over the cargo till it is put on board.

Bond as against cargo invalid.

Bowdler and *Bathurst*, proctors for the bondholders.

Tebbs for the owners of the cargo.

1858.

December 8.

In the Privy Council.

Present—The Right Hon. Lord KINGSDOWN.
 The Right Hon. Sir EDWARD RYAN.
 The Right Hon. Sir J. T. COLERIDGE.

THE NORTH AMERICAN.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision—Estoppel by Pleading and Evidence—Practice—Costs.

The Court will proceed *secundum allegata et probata*, even though entertaining some doubt whether, in so doing, it will arrive at the real truth and justice of the case.

In a cause of collision, therefore, the party suing cannot recover in full if he fails to prove the case set up in his pleading and evidence, although no fault be proved against his vessel, and fault is established against the other vessel.

The libel and evidence of A., a foreign vessel, close hauled on the starboard tack, alleged B. to have had no look-out, to have starboarded just before the collision, and to have struck A. with her starboard bow; B.'s want of look-out was proved, but it was proved that B. struck A. with her port bow; B.'s starboarding was not proved. Held that A. could not recover in full.

Where both parties appeal from a sentence of the Court below, pronouncing both to blame, and the sentence is affirmed, no costs of the appeal given.

THIS was a cause of collision, on appeal from the High Court of Admiralty.

Addams, Q.C., and *Twiss*, Q.C., for the *Tecla Carmen*.

Wilde, Q.C., and *Deane*, Q.C., for the *North American*.

Judgment.

In this case, on the 6th April, 1858, a suit of damage was instituted in the High Court of Admiralty by the Spanish barque *Tecla Carmen* against the ship *North American*. The Court was of opinion that both parties were to blame and had contributed to the accident. From this sentence an appeal has been brought by the *Tecla Carmen*, and there is a cross appeal by the *North American*.

Facts admitted.

The collision occurred in St. George's Channel on the night of the 8th March, 1858. The *North American* is a large vessel of 1,330 tons, and the barque a small vessel of 285 tons. Both were bound for Liverpool; the *Tecla Carmen*

in ballast, the North American with a cargo of cotton. Both vessels were close hauled: the Spaniard on the starboard tack, and the North American on the port tack. Upon these points there is no difference between the parties. Nor was any question made as to the law, and the duty which that law imposed upon each vessel. The North American being on the port tack was bound to give way to the Tecla Carmen on the starboard tack, and if she saw any danger of collision to port her helm and to go to leeward of the Tecla Carmen, who was entitled to keep her course, and was bound indeed so far to keep it as not by deviating from it to run into danger.

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It is admitted that the North American did not in fact port her helm till a minute or two before the collision took place. To justify this, it was alleged that the Spaniard had no lights exhibited, and could not therefore be seen till she was within six or eight hundred feet. The Court below has held that this defence was not made out, and that the neglect of the North American to keep a good look out and to port her helm, in due time at all events, contributed to the accident. In this opinion their Lordships and the naval gentlemen by whom they are assisted entirely concur. Upon this point, therefore, the judgment must be affirmed.

Want of look-out established against the North American.

The great question is, whether the Tecla Carmen was also in fault? The fault imputed to her is, that instead of keeping her course she starboarded her helm, and thereby brought herself into collision with the other ship. And it is material to attend to the case in the pleadings and sworn to by the witnesses on each side, for we must proceed *secundum allegata et probata*, though we may entertain some doubt whether in so doing we shall arrive at the real truth and justice of the case.

Was the Tecla Carmen also in fault?

The Court must proceed *secundum allegata et probata*.

The libel on the part of the Spanish vessel alleges that the accident took place in the following manner:—That the North American was first seen by the Tecla Carmen at the distance of about a mile, and from three to four points on her port bow; that the Tecla Carmen held her course, and that the North American did the same till she was within such a distance of the Tecla Carmen as to make a collision inevitable; that in order to break the force of the blow the Tecla Carmen then ported her helm and luffed up into the wind, but that the North American with her *starboard* bow struck the Tecla Carmen on her port side abreast of her forerigging, and raked her from thence right forward, carried away her mainmast and part of her mizenmast, and in

The libel states that the North American struck with the starboard bow.

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Counter allegation, that the Tecla Carmen starboarded, and struck the North American on the port bow.

short reduced her to such a state of wreck that it was necessary for the crew to abandon her. The allegation on the part of the North American insists that if the two vessels had held their respective courses no collision would have taken place, but that the Tecla Carmen starboarded her helm and ran into the North American on her port side, the bowsprit of the Tecla Carmen passing under the bowsprit of the North American and striking the North American on her port bow near the hawse-pipe; and the Tecla Carmen being forced round by the weight and impetus of the North American, the port bow of the Tecla Carmen then came in contact with the starboard bow of the North American, and the two vessels lay for some time alongside chafing against each other. In proof of this statement the allegation refers to a model of the bows of the North American, showing the damage done to each bow, and which, it alleges, proves that the collision must have been on her port and not on her starboard side. The parties are therefore directly at variance in their pleadings as to the mode in which the collision took place.

The witnesses for the Tecla Carmen follow the libel; also charging the North American with starboarded.

The master of the Tecla Carmen states the accident to have taken place in the manner stated in the libel, viz., by the *starboard* bow of the North American running into the port bow of the Tecla Carmen, and he alleges that the North American starboarded her helm, and thereby occasioned the collision. The boatswain gives the same account, and so do all the witnesses on the part of the Tecla Carmen, with the exception of the mate; but it is very remarkable that this witness, in his examination in chief, gives a totally different account, and one which agrees with that subsequently given by the North American. He says, "The North American hit us first with her stem and then with her *port* bow on our port bow a little before our forerigging. The blow led aft. When she hit us she slewed us right round, and her starboard side came alongside our port side. She broke our bowsprit and foremast, and our main and mizen-topmasts came down and stove in our port bow."

The evidence on the other side conclusive; the collision was with the *port* side of the North American.

The witnesses on the part of the North American all concur in stating that the collision took place in the manner stated in their allegation. And before the case closed evidence came to light which, in their Lordships' opinion, removes all doubt upon this part of the case. The master of the North American alleged that the inspection of the bows of the ship showed that the collision must have taken place on her port side, and that the violence had been such that the bowsprit of the Tecla Carmen had torn away a portion of the plank against which it struck.

The shipwright at Liverpool who examined the ship was of opinion that this injury had been caused by the iron band of the cap of the bowsprit of the Tecla Carmen. The Tecla Carmen had drifted to Aberystwith, and it seems to have occurred to the master of the North American that if he could find the cap of the Tecla Carmen's bowsprit it might present evidence in confirmation of this important fact. He accordingly went down to Aberystwith: he found that the Tecla Carmen had been broken up, but he succeeded in obtaining what we are quite satisfied are the pieces of wood forming the cap of her bowsprit, with the iron band, or one of the iron bands, which bound them together. This wood was found to be crushed and split as by a collision; the cap is of elm, and bedded and wedged in it was found a piece of oak of which wood the plank of the North American is formed. The piece of plank which sustained the injury, cut out from the port bow of the North American, and the cap of the bowsprit of the Tecla Carmen, which is alleged to have inflicted the injury, were produced in the Court below and before us, and we are entirely satisfied, as the Court below was satisfied, that the collision took place with the port and not with the starboard side of the North American.

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But from this fact the Trinity Masters, in the Court below, have drawn the inference that the Tecla Carmen starboarded her helm; at least, we are not aware of any other evidence entitled to the least credit to show that she did so. We confess we have great difficulty in drawing this inference. Our Nautical Assessors are of opinion that, having regard to the position of the two vessels as it appears in the evidence, when the North American was first seen from the Tecla Carmen, they would have run into each other if both had held their courses, and that the North American having ported her helm just at the last moment, the collision might have taken place exactly as it did without either the Tecla Carmen having starboarded her helm, as alleged by the North American, or the North American having starboarded, as alleged by the Tecla Carmen. This certainly would be most consistent with the probability of the case. The Spanish vessel would be likely to hold her course knowing that the other ship was bound to give way; the North American would hold her course because she was not aware of anything that made it necessary for her to alter it. There seems no conceivable motive why either vessel should have starboarded her helm. In this view of the case the North American alone would be in fault from her neglect to keep a vigilant look out, and the sentence would require to be altered.

But it does not follow that the Tecla Carmen starboarded; and the probability is the other way.

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The Tecla Carmen, however, has failed to establish the case as set up in her pleadings and evidence, and cannot take the benefit of another state of facts.

If it were necessary for us to determine this point we should be under great difficulty; for while, on the one hand, we should strongly incline to this view of the case, it must rest in a great measure upon the opinion of our Nautical Assessors differing from that of the Trinity Masters in the Court below; and, in order to advise the reversal of a judgment, we must not merely doubt whether it is right, but be satisfied that it is wrong. But we think that this view of the case is excluded by the pleadings and the evidence. The Tecla Carmen rests her complaint upon this, that the collision took place on the starboard side of the North American, and that the ships would have actually gone clear of each other if the North American had not starboarded, and thereby brought her starboard bow into collision with the port bow of the Tecla Carmen. All the arguments below and before us proceeded on that basis; and we do not think that it would be consistent with the safe administration of justice to alter the judgment upon grounds quite inconsistent with the case made by the Appellants in their allegation, and in their evidence and at the bar.

Sentence affirmed, but without costs.

We must advise the affirmation of the sentence; but, as both parties have complained of it, there will be no costs.

Clarkson, proctor for the Tecla Carmen.

Rothery for the North American.

In the High Court of Admiralty.

THE MILFORD, BENNETT MORGAN, *Master*.

Foreign Ship—Master's Wages—Lex Fori—17 & 18 Vict.

c. 104, ss. 109, 191.

In a suit by a foreign master against the freight for his wages, the question whether the freight is liable is a question of remedy and not of contract, and is therefore to be determined by the *lex fori*.

A statute general in terms and intended for the protection of navigation applies to foreign vessels within British waters.

The 191st section of the Merchant Shipping Act, 1854 (notwithstanding s. 109), extends to the masters of foreign ships, and gives them a remedy against ship and freight for their wages.

March 29.

THIS was a suit for wages, brought by Bennett Morgan, the master of the Milford, against freight due on the voyage as under stated, and against William W. Wakman and Zalman

B. Wakman, both of South Port, Connecticut, in the United States of America, the owners of the ship Milford intervening for their interest in the said freight.

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The owners appeared to the suit under protest. The act on protest stated that the Milford belonged to South Port, in Connecticut, U. S. North America; that Bennett Morgan was a native and subject of the United States; that in November, 1856, Morgan shipped as second mate on board the Milford, bound from San Francisco, in California, to the United Kingdom; that in consequence of a series of deaths Morgan, on the 10th of March, 1857, assumed the command and acted as master; that he proceeded to Rio Janerio for repairs, where he remained from the 9th of April to the 14th of July; for the expenses connected therewith he, as master, granted a bottomry bond on the ship and freight for 3,229*l.*, which had subsequently been paid by the owners' agents in this country; that Morgan arrived in command of the ship in the port of London in September, 1857; that from the 11th of April, 1857, one of the crew had been appointed first mate, and had received first mate's wages since that date; that by the law of America the master of an American ship has no lien upon, or right of action against, the freight for wages earned as master of such ship; and that such was well known to be the law by judges, advocates and lawyers in the United States of America; that Morgan's wages as first and second mate had been tendered to him since the arrival of the ship in England, but that he had refused to receive the same; and prayed the Court to pronounce only for the wages due to Morgan as first and second mate, and to condemn him in the costs of the petition.

The answer on behalf of the master took issue on the law of the United States, and asserted that the master of an American ship has a lien on, and a right of action against, freight earned in such ship whilst under his command, and prayed the Court to pronounce for the right of Morgan to proceed in this Court against the freight earned whilst he was master.

As to the American law the parties agreed to use as evidence certain opinions of American lawyers on a case submitted to them in the *Jonathan Goodhue*, a New York vessel, lately sold under authority of the High Court of Admiralty of England, at the suit of a bottomry bond holder. One question there raised was as to the master's lien for wages on the freight.

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Addams, Q.C., for the master, contended that on the balance of evidence as to the law in the United States, before the Court, it must be taken to have been ruled in the case of the *Spartan* (a), that a master has a lien on the freight for his wages as well as for liabilities or disbursements on behalf of the ship.

Phillimore, Q.C., and *Robinson*, *contra*, in support of the protest:—This is an American ship, and the master is an American subject. What law is the Court to look to in deciding the question? It must be either the *lex loci contractus* or the *lex fori*: if the former, the burden of proof is on the claimant to establish clearly the foreign law under which he claims, and that burden is very far from being discharged by showing that the American law is in a contradictory and conflicting state on the point, which is the utmost the opinions before the Court can show; and even then the case in the Court of last resort in the State of New York, *Van Bokkelen v. Ingersoll* (b), is in our favour. On the question of the *lex fori*, we contend that it is not applicable at all to this case. *Don v. Lippmann* (c), determined that the remedy must be taken according to the law of the country in which it was sought, but that the meaning of a contract must be determined according to the *lex loci contractus*. In this case the original contract entered into in America was limited by the United States law, which we take to be, that the master has no lien on ship or freight for his wages; and that is part of the contract which the Court has to act upon. If, however, the Court should be of opinion that the *lex loci* is not applicable, then comes the question whether it is to be the general maritime law as administered by the Court before the statutes which modify it, or whether the law as laid down by the Merchant Shipping Act. The 17 & 18 Vict. c. 104, s. 191, gives the master the same remedies for wages in the Court of Admiralty as seamen; but the 109th section limits the application of the third part of that statute to sea-going ships registered in the United Kingdom, and to ships registered in any British possession under certain circumstances. In the *Golubchick* (d), the Court held that questions of wages were to be decided by the general maritime law.

By what law is
the question to
be decided?

DR. LUSHINGTON:—This is a question of great importance and of some difficulty; but as the subject has been discussed in another case some time since, and I have taken the matter into full consideration, I shall not delay pronouncing the opinion at which I have arrived. The main question is, whether the Court

(a) 1 Ware's R. 162.

(b) 5 Wendell's R. 315.

(c) 5 Cl. & Finn. 1.

(d) 1 W. Rob. 143.

ought to apply the *lex loci contractus* or the *lex fori*; and if the latter, whether the law maritime as administered previous to the changes made therein by statute law, or the law as it now stands under the Merchant Shipping Act. It is impossible not to be struck with the inconveniences which might ensue if the Court is to be governed by the *lex loci contractus*; in every case in which a foreign seaman or master sued, the Court would have to inquire into the contract and into the law of the country under which it was made; and the difficulties with respect to the United States of America is very great, for, though the decisions of their Supreme Court may, generally speaking, be binding, yet the laws of their different states vary in their application of maritime law as well as in their municipal regulations; and the cases cited show that this is so as to proceedings against ship and freight on account of wages and advances. We know quite well that this Court had no jurisdiction as to masters' wages, but it is by no means so clear what were the rights which a master might have had in a Court of Equity against ship, cargo and freight. The facts of the case, as stated in the pleadings, are few and simple. Morgan is a subject of the United States. He shipped on board an American ship at San Francisco as second mate. By the successive deaths of the first mate and master he became in possession of the ship as master. As first and second mate, and also as master, he now proceeds against the freight; wages have been tendered up to the time when he became master, and issue is taken as to the right of lien on freight. I have very serious doubts whether the question as to the law of the United States is the true question, and whether I am called upon to give any opinion upon that law.

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Facts of the case.

Turning then to the law ordinarily administered in this Court:—Morgan is before the Court as a foreigner and as master of a vessel. We all know that as master he could not by the old maritime law have sued for wages in the Admiralty Court at all; a master had no *locus standi* here till the Legislature gave him, first, a remedy in the case of insolvent or bankrupt owners; and secondly, by the Merchant Shipping Act, put him in the same position as any seaman. If a foreign master can now sue in this Court, he is entitled to proceed against the freight like other seamen. How, then, stood the case as to foreign seamen previously to the statute? In the *Golubchick* the question was fully considered, and I there laid down a rule that notice should be given to the consul of the state to which the vessel belonged—not binding myself, however, to act in accordance with the views the consul might entertain, but I was anxious that the Court might

As master, his right to sue depends on the Merchant Shipping Act.

Position of foreign seamen before Merchant Shipping Act.

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know what objections were taken to the exercise of its jurisdiction, and be placed in a position to act according to the justice of the case. I adopted that course of proceeding on very mature consideration, and I will state why I did not in such cases so precisely follow Lord Stowell's practice as I have made a point of doing in others. With regard to applying the powers of the Court of Admiralty to foreigners at all, Lord Stowell always stood in awe of a prohibition, and therefore, as I think, was too abstinent in taking any step which might, by possibility, expose him to such interference. As I have said, I do not consider the representation of the foreign consul absolutely binding. Cases of great hardship might occur where a vessel was sold under decree of the Court, and neither master nor mariners left with any means of subsistence. Upon the present occasion I know that notice to the American consul has been given, and, as he has not interfered, I consider that I have his indirect sanction. If any representation had been made that the administration of the law of this Court would interfere with the particular law of the country to which the vessel and master belong, it might be another matter.

It is no hindrance to the suit that the Plaintiff is master of a foreign ship. This is a question of remedy, not contract, and must follow the law of the forum in which it is sought;

Morgan's character as foreigner being then no hindrance to his suit, the next question is, whether the law of the United States is applicable? It may be, for if I am to construe a contract, its meaning and extent must doubtless be governed by the *lex loci contractus*; but does this question turn on the meaning of a contract? The Court has no contract before it; I have no means of knowing whether the contract contained any special agreement or any stipulation intended to protect the owners against the jurisdiction of foreign tribunals. I am bound to take it as an ordinary maritime contract, Morgan succeeding as *hæres necessarius* to the original master. It was very ingeniously contended that the law of the United States formed part of the contract; but I cannot think so: the proceeding originated in this country; it is a question of remedy, not of contract at all. Now the law as to contract and remedy was settled by *Don v. Lippmann*, to the effect that the remedy must be according to the law of the *forum* in which it is sought. I need not say that I should be bound by a rule so laid down by the House of Lords, even if I doubted its soundness; but I entirely concur in the principle there laid down. It would be pedantry to refer now to the authorities there quoted; Lord Brougham's judgment contains them all. Now in this case the legality of the arrest of the freight is the whole matter in dispute. Then comes the important question, whether the *lex fori* in the

present case is to be the general maritime law as formerly used in this Court, or that law as modified and extended by statute? If the old law is to govern, it entirely puts an end to the master's case. But what is there to prevent the application of the Merchant Shipping Act, 1854, the 191st section of which gives the master the same rights and remedies for the recovery of his wages as seamen have? The construction put upon the 296th section of the Act in cases of collision, where foreign vessels on the high seas are concerned, cannot bind it in the present case (a). In cases of collision the Court has held that a British statute could not regulate the conduct of foreigners on the high seas. No doubt similar questions may arise in the application of the statute as have occurred with regard to pilotage under former Acts. The general rule, however, has been, that where vessels are within British waters, a statute, general in terms and intended for the protection of navigation, would apply to foreigners, as in the case of statutory obligations to take pilots on board under certain circumstances. As to Dr. Phillimore's remarks on the 191st section, the words of that section are undoubtedly broad enough to cover the case of foreign masters. "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or, by any law or custom, any seaman not being a master, has for the recovery of his wages." But it is said, that the 109th section of the Act restrains the application of s. 191 to certain classes of vessels there named. The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which tend to show that the Court should not apply section 191 to foreign masters and seamen. As there are no such words, is it consistent with justice that the Court should hold its hand in all these matters, and say, that as to foreign masters it will impose a restriction not found in the statute? I think I am bound to apply the remedy given by the statute. If I thought it my duty to go into the *lex loci contractus*, I certainly could come to no conclusion one way or the other about it on the evidence now before me; but I think I am bound to apply the general law of this Court as it at present exists, to overrule this protest with costs and allow the case to proceed.

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and as part of that law the Merchant Shipping Act, 1854, is applicable to the present case.

A statute general in terms, and intended for the protection of navigation, extends to foreign vessels within British waters.

See 17 & 18 Vict. c. 104, s. 191.

The language of s. 109 is affirmative only, and is not to be construed as exclusive.

Protest overruled with costs.

Bathurst, proctor for the owners.

Clarkson for the master.

(a) See *Zollverein*, ante, p. 96; *Cope v. Doherty*, 4 K. & J. 367.

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THE HELEN AND GEORGE,—CONNELL, *Master*.

Salvage—Agreement—Onus Probandi.

A salvage agreement will be upheld, unless proved to be very exorbitant, or to have been obtained by compulsion or fraud.

THIS was an action of salvage brought by the master, owners and crew of the lugger *Argo*, against the schooner *Helen and George*, her cargo and freight.

The service rendered was assisting the schooner into Bridlington Harbour, on the 1st of February, 1858. A gale was blowing from the N.N.E., with snow squalls and a heavy sea running; several vessels were driving with both anchors down, and others slipping from their anchors. The schooner was anchored on the edge of the Smethwick Sand, with one anchor down and thirty-five fathoms of chain, about three miles distant from the harbour. The salvors, nine in number, put out in their lugger or coble to assist vessels in distress, and observing the schooner in a dangerous position and pitching gunwales under, came alongside and succeeded in putting four men on board. They found the schooner's handspikes and part of her running gear washed overboard, and the master disabled with a broken collar-bone. They negotiated with the master, who wanted the schooner to be taken into the harbour; and he finally wrote out and signed the following agreement:—

“Bridlington, February 1st, 1858.

“This is to certify that I, James Connell, master of the schooner *Helen and George*, of Leith, have this day agreed with Charles Wright and others to assist in taking the *Helen and George* into Bridlington Harbour for the sum of 80*l*. Obligated to slip anchor and chain, and other gear being washed-off the decks.

JAMES CONNELL, Master.

CHARLES WRIGHT.

WILLIAM MILES.”

The salvors then slipped the schooner's chain and made sail, and with some skill succeeded in bringing her safe into the harbour.

On the part of the owners the salvage service was denied. It was alleged that the ship was riding safely, and that the only reason for taking her into harbour was to obtain surgical assistance for the master; that the salvors refused to go on shore and bring off a surgeon, and that they extorted the agreement from the master when he was suffering great physical pain. The value of ship, cargo and freight was 559*l*.

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Jenner for the salvors.

The *Admiralty Advocate* and *Deane*, Q.C., for the owners.

DR. LUSHINGTON:—This case turns upon the effect of the agreement, which was certainly made by the master. It was truly contended by Dr. Jenner that such agreements will generally be enforced by the Court. The principle on which the Court acts is, that if satisfied that an agreement has been made, it will carry it into effect unless totally contrary to justice and the equity of the case; but the owner of the ship, against whom the agreement is attempted to be enforced, may show that it was improperly obtained. The owner may contend that, under the circumstances, the sum of money was grossly exorbitant; and, *à fortiori*, if he can show that the agreement was obtained by fraud or compulsion, no Court would hold it to be binding. But when the execution of such an instrument is once proved, it is *prima facie* binding, and the burden of proof falls on those who dispute the validity of the instrument.

A salvage agreement will be upheld, unless proved to be exorbitant or to have been obtained by compulsion or fraud.

The owners in the present case say, first, that there was no necessity for salvage assistance at all, and that the agreement is inequitable. But how stands the case on the whole of the evidence? The period of the year, the 1st of February, is as dangerous for navigation as any part of the twelve months; a heavy gale was blowing; the ship was in the notoriously dangerous neighbourhood of Bridlington Bay; several ships were dragging their anchors. Then the schooner had lost her handspikes; but, says the master, he would have done very well if handspikes had been brought out to him. This may be so, but in such weather it was no light matter to go on shore and fetch handspikes off, and she clearly could not weigh anchor without them. Without saying that these facts entirely justify the sum of money agreed upon, I cannot say that the vessel was not in need of assistance, or that the bargain was so exorbitant as to warrant the Court in interfering with it.

The agreement not exorbitant,

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nor proved to
have been un-
duly extorted.

Agreement
pronounced for.

The owners say, secondly, that the master, who had broken his collar-bone, was in a state of great physical suffering, and that the agreement was extorted by the alleged salvors refusing to take him on shore or to go and bring a doctor off. This might be to the purpose if established, but how does the evidence stand? It is very important to the due administration of justice to bear in mind on whom the burthen of proof falls. The witnesses on the part of the owners have sworn one way, and are directly contradicted by the salvors; the burthen of proof is on the former, and I do not consider that they have discharged it. It was argued that greater credence is due to them because the master must have been in need of surgical aid. But the proposition that the boatmen should go on shore and bring off a surgeon was not very reasonable or very likely to have been made. The vessel, in fact, was taken into the harbour under the agreement, so we come back to the question of excess. As I have said, I am not disposed to upset the agreement on that ground. I pronounce for the agreement.

Dyke, proctor for the salvors.

Stokes, proctor for the owners.

In the Privy Council.

Present—The Right Hon. Dr. LUSHINGTON.

The Right Hon. T. PEMBERTON LEIGH.

The Right Hon. Sir LAWRENCE PEEL.

The Right Hon. Sir JOHN CULERIDGE.

The Right Hon. Sir CRESSWELL CRESSWELL.

THE INCA.

Salvage—Maximum of Remuneration.

A moiety of the property saved, with costs, is the maximum of remuneration that can be allowed to salvors; and this rule applies to Vice-Admiralty Courts abroad.

Semble, The same rule does not obtain in derelict.

June 24.

THIS was a cause of salvage, on appeal from the Vice-Admiralty Court of the Bahamas.

Addams, Q.C., and *Spinks* for the Appellants.

The Queen's Advocate and Kingdon for the Respondents.

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Right Hon. DR. LUSHINGTON, delivering the judgment of the Court:—It will not be necessary to enter into any minute examination of the circumstances of this case, because it is admitted on all hands that a most meritorious service has been performed by the salvors. The service involved considerable risk of life to the salvors, and unless it had been effectually performed, the whole of the property saved would undoubtedly have been lost. The sole question therefore is, what is the amount of remuneration, which, under circumstances like these, ought to be allowed to the salvors?

The amount of remuneration the only question.

The decree of the Vice-Admiralty Court is to the following effect:—"The salvors to be paid in kind at the rate of sixty-six per cent. on the dry, and seventy-six on the wet cotton, and seventy per cent. on the net sales of the materials and stores. The wharfage, storage and labour hire to be borne by each party, in proportion to their respective interests. The costs to be paid by the owners."

Decree of the Court below.

The question then assumes this shape only, whether the decree of the Court below is in conformity with the rules which have governed the Courts in this country; and, if not, whether there are any particular circumstances, which ought to induce their Lordships to come to the conclusion that an exception should be allowed in this case.

Now, as to the general rule, we apprehend that little doubt can be entertained, for we find Lord Stowell, in the case of *L'Espérance* (a), expressing himself in these words: "In no instance (except where the Crown alone has been concerned, and where no claim has been given for a private owner) has more than one-half been decreed by way of salvage." And in a subsequent case (though it occurred a good many years after), he adhered to the same rule. He said in the case of the *Frances Mary* (b), "The fund is unfortunately small, but it is a case of extraordinary merit, and the Court should be liberal—I incline to decree 350*l.*, and if an instance can be produced, in which in a case of this description the Court has exceeded a moiety, I will allow the sum I have mentioned; but if not, I shall direct a moiety to be paid to the salvors." Then there comes this note, "On the 18th of May a moiety was decreed to the salvors, their expenses being first paid out of the other moiety."

The rule is that a moiety of the property saved is the maximum of salvage remuneration.

(a) 1 Dod. 49.

(b) 2 Hagg. 90.

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It appears, therefore, to be perfectly clear, that after an examination of the previous cases no instance could be found in which the salvors had had decreed to them a sum exceeding a moiety of the proceeds.

Her Majesty's Advocate cited several cases, but they were all of them cases of *derelict*, which have always been considered, in the Court of Admiralty especially, as distinguished in principle from cases of ordinary salvage; because in cases of *derelict* (as the word itself necessarily imports), the property has altogether been abandoned by the owners, or which is the same thing, by the master and crew who represent them, and that "*sine spe recuperandi*."

But even in those cases which have been cited to the Court, their Lordships find, on examining them, that they were all of such a stringent and peculiar character, that they cannot operate as a guide in the determination of this case. In one of those cases (*a*), no less than five weeks had been employed, and great risk of life incurred; and in another (*b*), a vessel and crew were hired for the service, and the service occupied several months in its performance.

And there are no sufficient reasons for departing from the rule.

Then if the decree of the Court below be not in conformity with the rule, which has been established in the Court of Admiralty, and which has been supported by their Lordships in this Court, the question is, whether the reasons assigned by the learned Judge of the Vice-Admiralty Court are sufficient to induce us to say that he was justified in adopting a different rule?

The statement of the learned Judge is this:—"It has been considered by myself, and I believe by the previous Judges of the Vice-Admiralty Court of this Colony, that the circumstances under which property is saved here are so widely different from those under which they are saved about the coasts of Great Britain, that the amount of salvage remuneration awarded by the Court of Admiralty in England would be quite inadequate to remunerate the wreckers of the Bahamas. The difference consists in this:—In England property is, in every instance, saved by vessels in the prosecution of some other business; whatever salvage remuneration therefore may be decreed to them is, de-

(*a*) *Reliance*, 2 Hagg. 90.

(*b*) *Jubilee*, 3 Hagg. 43.

ducting perhaps some loss for detention, clear gain. Not so with the Bahamas wreckers."

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Now it must be observed that here the learned Judge of the Court of Vice-Admiralty has made a statement with reference to the mode in which salvage is usually performed in this country, which is not quite consistent with the fact. It is not true that in every instance of salvage service here the property is saved by vessels in prosecution of some other business; on the contrary, along the greater part of the coast of this country there are persons employed exclusively in rendering salvage services, who build vessels peculiarly fitted and appropriated to that service, and who go out for the sole and express purpose of rescuing vessels in distress. And as for the difficulties and dangers attending the particular locality, we think it can hardly be said that there is much greater danger or much greater difficulty in salving vessels at the Bahamas, fearful as the difficulty may be, than there is in salving vessels on the coast of this country, more particularly on the northern and eastern coasts, and the sands adjacent to them.

Their Lordships are therefore of opinion, that the circumstances stated are not sufficient to sanction any deviation from that which has been hitherto the uniform practice of the Courts of this country; and, therefore, reluctant as they are to interfere with the decree of a Vice-Admiralty Court in what is, generally speaking, a matter of discretion, they feel themselves under the necessity of varying the decree on the present occasion.

It must be remembered that, if too large a rate of salvage is decreed, other evils may result from such a practice. I fear that there would often be a disinclination on the part of the masters of vessels to accept the assistance of salvors, even in a case of danger to life, if the cost of salvage service was likely to be very great.

Their Lordships further think it would be dangerous for any Vice-Admiralty Court entirely to release itself from adhering to the rules laid down by their Lordships in this Court and by the Court of Admiralty.

Therefore the decree their Lordships will make, or rather the variation in the decree, will be, that they will allow fifty per cent. of the value instead of the proportions awarded by the Court below; in other respects the decree will stand, the salvors re-

The salvors to be allowed half of the proceeds and their costs in the Court below.

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No costs of the appeal.

ceiving their costs in the Court below. With respect to the costs of this appeal, their Lordships are of opinion that no costs should be given on either side.

Rothery, proctor for the Appellants.

Clarkson for the Respondents.

In the Privy Council.

Present—The Right Hon. Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.
The Right Hon. Sir CRESSWELL CRESSWELL.
The Right Hon. Sir JOHN T. COLERIDGE.

THE FYENOORD, ROLFE, *Master*,

Collision in British River — Foreign Steamship — Custom emanating from Statute 17 & 18 Vict. c. 104, s. 297—Costs of Appeal.

Section 297 of the Merchant Shipping Act, 1854, prescribes that "Every steamship, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship." This section may (*seem*) be controlled by section 291, so as not to apply to a foreign steamship: but a customary course of navigation for all steamships on the river Thames will be presumed to have emanated from sect. 297, which course every foreign steamship is bound to know and obey.

The mere convenience of the foreign steamship, or of Custom-house officers in the performance of their duty, will not justify a departure from such customary course of navigation.

A steamship on her wrong side of the river, meeting another vessel, justified under the circumstances in porting to recover her proper side.

Where in a cause of collision the Appellant was found in the Court below solely to blame and condemned in the whole damage, and the Court of Appeal found both parties to blame, and divided the damage, costs of appeal given.

July 1.

THIS was an appeal from the High Court of Admiralty in a cause of collision brought by the trustees of the Thames Steam Towing Company, the owners of the steam tug *Samson*, against the steamship *Fyenoord* and her owners, the Netherlands Steamboat Company of Rotterdam, intervening. The collision took place about 4 A.M., of the 14th September, 1857, in

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the river Thames off Gravesend. The *Samson* had been coaling on the inside of the *Magnet*, the highest of a line of coalhulks moored on the south side of the river, and was steaming slowly out across the bows of the *Magnet* under her port helm, when she observed the *Fyenoord* coming up at speed along the coalhulks at a distance of 200 or 300 yards only. The master of the *Samson* perceiving that if he backed astern he would be driven by the ebb tide foul of the *Magnet*, put on at full speed to cross the bows of the *Fyenoord*, porting his helm at the same time; but the *Fyenoord* porting ran into the starboard quarter of the *Samson*, sinking her immediately. The *Samson* also pleaded that the line of coalhulks intercepted the view of the *Fyenoord* and prevented her from being seen until the *Samson* had crossed the bows of the *Magnet*. The *Fyenoord* alleged the blame of the collision was with the *Samson* for an insufficient look-out and rashly steaming across the *Fyenoord*'s track; and defended being to the south of mid-channel on the ground that the 297th section of the Merchant Shipping Act, 1854, did not apply to foreign steamships, and that if it did the *Fyenoord* was justified in departing from the rule in order to take the Custom-house officers on board, according to the custom of the river. The Court below held the *Fyenoord* solely to blame. From this judgment the owners appealed.

Addams, Q.C., and *Twiss*, Q.C., for the Appellants.

A foreign vessel is not bound by the 297th section of the Merchant Shipping Act, 1854. The general words of that section, "Every steamship, &c.," are controlled by the application clause of Part IV. of the Act, s. 291: "The fourth part of this Act shall apply to all British ships; and all foreign steamships, carrying passengers between places in the United Kingdom, shall be subject to all the provisions contained in the fourth part of this Act, and likewise to the same provisions with respect to the certificates of the masters and mates thereof to which British steamships are subject." There cannot be a stronger example of the maxim "*Expressio unius exclusio alterius*;" the maxim applies with twofold force. In *Cope v. Doherty* (a), Wood, V. C., in deciding that Part IX. of the Act was not applicable to foreign vessels, referred to the application clause of Part IV., and observed, "Taking the whole of that clause together, the wording is rather favourable to the contention that foreign ships are not intended, except where specifically adverted to." What-

(a) 4 K. & J. 381.

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ever the interpretation of the statute, the *Fyenoord* was justified in following the custom of the river in proceeding rather to the south of mid-channel for the purpose of taking up the Custom-house officers.

Deane, Q.C., and Vernon Lushington for the *Samson*.

The 297th section applies to foreign steamships, and is not limited by the 291st. The terms of the 291st section are affirmative only, and where the Act intends to exclude it uses excluding words, as in sects. 4, 215. The 191st section, which belongs to Part III. of the Act, where there is an application clause of limited affirmation like the present, has been held to include the case of a foreign master (*Milford*) (a). If the 297th section can admit of our interpretation, public policy clearly requires that it should prevail. Many examples from other statutes may be found, in which general words include foreigners. Thus the owners of foreign vessels within the jurisdiction have always been held intitled to the exemption for acts of a licensed pilot given by 6 Geo. 4, c. 125, s. 53; and foreign authors, publishing in this country, are intitled to benefit of copyright under 8 Anne, c. 19; *Jefferys v. Boosie* (b). The observation of Wood, V. C., in *Cope v. Doherty*, as to the extent of the application of Part IV. of the Act, was an *obiter dictum*; the true ground of that decision was that the foreign vessel at the time of the act done was on the high seas out of the jurisdiction of English law; but here the collision took place in the Thames. The doctrine of reciprocity alluded to in that judgment is really in our favour; it amounts to this, that one law should govern both parties in similar circumstances (c). But even if the limited construction of sect. 297 must prevail, the Court will presume the statute to have been generally obeyed by British steamships, and this being a British river will thence infer that a customary course of navigation for all steamships has been established, which the foreign steamship was bound to know and obey. This conclusion is not unjust to the foreigner, who is benefited by a consistent rule of navigation being observed, and is necessary for the security of life and property on the river. The custom relied upon by the other side is not sufficiently proved, and is bad in law, being contrary to public policy.

Addams, Q.C., in reply.

The Right Hon. Sir C. CRESSWELL:—Their Lordships have

(a) Ante, p. 362.

(b) 4 H. of L. C. 815.

(c) See *Santa Cruz*, 1 C. R. 49; *Zollverein*, ante, p. 96.

considered the case presented to the Court below, the judgment there given and the arguments adduced before themselves, and do not find any difficulty in coming to a conclusion on the matter.

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The first question is as to the conduct of the *Fyenoord*. It has been contended on behalf of the Respondents, that the *Fyenoord* was bound by the statute to keep towards the north shore. We think it unnecessary to give any opinion upon that point, because, even supposing that the statute does not apply to foreign vessels, we must presume that a customary course of navigation has emanated from the statute, and that this was known to those on board of the *Fyenoord*. That course bound her to the north side of the river, but she left that proper course and came across to the south side, partly for her own convenience, partly for that of the Custom-house officers. In so doing she acted at her own risk if any ill consequences ensued. We are, therefore, of opinion that the *Fyenoord* was to blame.

Section 297 may not be binding on a foreign steamship, but the Court will presume a customary course of navigation to have emanated from the statute, which the foreigner was bound to observe.

The mere convenience of the ship, or of the Custom-house officers, will not justify a departure from the ordinary course of the navigation of the river. The *Fyenoord*, therefore, to blame.

The *Samson* to blame also for want of a vigilant look-out.

Now as to those on board the *Samson*, we have as little doubt that they were also in fault. It appears that they had been taking in coal on the "blind" side of the hulk, and had thereby been hindered from seeing what was going on in the fairway. We do not think that the coal-sacks, said to have been piled up on the hulk's deck, were so high as to have hindered them seeing if proper precautions had been taken. Afterwards, as the *Samson* was clearing the coal-hulk, she saw the *Fyenoord* coming up. At first she attempted to go astern; then, after apparently calculating the risk of backing on the *Magnet*, and of clearing the bows of the *Fyenoord*, her master put on all steam and rushed across the track of the *Fyenoord*. It is said she would still have been safe if the *Fyenoord* had not made a false move in porting; but their Lordships think that porting at the time she did was the proper thing. Knowing that she was too far to the southward she ported in order to get back to the northward. If the master of the *Samson* had abided by his first intention and stayed where he was, we think the collision would not have occurred.

The *Fyenoord* was justified in porting to recover her proper side of the river.

As the fault of each conduced to the loss sustained the damage must be divided. The Appellants to have their costs of appeal.

Damage to be divided. Appellants to have their costs of appeal.

Clarkson, proctor for the *Fyenoord*.

Rothery for the *Samson*.



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In the Privy Council.

Present—The Right Hon. T. PEMBERTON LEIGH.
 The Right Hon. Sir E. RYAN.
 The Right Hon. Sir CRESSWELL CRESSWELL.
 The Right Hon. Sir J. T. COLERIDGE.

THE EVANGELISMOS.

Collision—False Arrest—Costs and Damages.

A plaintiff in a cause of collision failing to prove the identity of the ship proceeded against, is not liable for damages occasioned by the arrest of the defendant's ship, unless the arrest was made *malâ fide* or with *crassa negligentia*.

THIS was an action of collision brought by the owners of the British brig Hind against the Greek brig Evangelismos. The Evangelismos was arrested on the 20th of October, 1857, and not being bailed continued under arrest. On the 1st of March, 1858, the learned Judge of the High Court of Admiralty pronounced that it was not sufficiently proved that the Evangelismos was the vessel which came into collision with the Hind, and dismissed the action with costs. Application was thereupon made in chambers to the learned Judge to condemn the owners of the Hind in all damages occasioned by the arrest; but he refused the application, upon the ground that the arrest had not been made *malâ fide*. From this part of the decree the owner of the Evangelismos appealed.

Addams, Q.C., and Twiss, Q.C., for the Appellant.

The arrest was without probable cause, and thereby the Appellant, a foreigner, has sustained great damages. The power of arrest is very open to abuse, and requires to be restrained by penalties against it being maliciously or even rashly exercised. It is the practice of the Admiralty Court to give damages in the case of a false arrest. The *Orion* (a), a cause of collision; *Glas-*

(a) The following is a report of this case as extracted from the Registrar's book:—The *Orion* was arrested at the suit of the owners of the *Waterloo* in a cause of damage. In a few days it was discovered that the *Orion* was not the right ship, and the action was thereupon

subducted, and the ship released, having been under arrest six days. The Court condemned the owners of the *Waterloo* in costs and damages, caused by the illegal arrest of the *Orion*, and referred the amount to the Registrar and merchants.

gow (a), a cause of possession, and *Nautilus* (b), a cause of salvage. So at common law, an action lies against the sheriff for a seizure of the wrong goods; *Jarmain v. Hooper* (c). 1858.
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[Their Lordships declined to consider prize cases of costs and damages, as being subject to very different considerations.]

Deane, Q.C., and *V. Lushington* for the Respondents.

The facts show that the arrest was *bonâ fide*, and not malicious. Proceedings in the Admiralty Court being *in rem*, the arrest was the necessary foundation of the action; and, by putting the law in motion under a mistake but *bonâ fide*, no wrong is committed for which damages can be recovered; *executio juris non habet injuriam*. The proper penalty for such a mistake is costs, in which the plaintiffs have been condemned; and no authority in the Admiralty Court can be produced for giving damages for an improper arrest unless malice is proved. In the *Glasgow* and the *Nautilus*, where damages were given, malice was proved and formed the foundation of the judgments. The facts of the *Orion* are not fully stated, and the motion of the defendants for damages does not appear to have been opposed. The Court of Admiralty does not even always give costs against an unsuccessful plaintiff: thus in causes of collision by inevitable accident, *Ebenezer* (d), *Itinerant* (e); or where the defendant establishes a defence under the Pilot Act, *Agricola* (f); or in causes of salvage, where the tender, though sufficient, is not so large as to make the refusal *malâ fide*, *William* (g), *Princess Alice* (h); or where the point raised and decided against the plaintiff is novel and a proper point for discussion, *Maitland* (i), *Harriot* (k), *Lord Auckland* (l). All authority is in favour of the Respondents. Bentham, speaking of the law of costs, says, "Litigation, though eventually it prove groundless,—litigation, like any other course of conduct of which mischief is the result, is not, therefore, blameable; and where it is blameable, there is a wide difference whether it is accompanied by temerity only, or with consciousness of its own injustice. The countenance shown to the parties by the law ought to be governed, and governed uniformly and proportionally, by these important differences" (m). In common law, where the plaintiff brings his

(a) Ante, p. 145.

(b) Ante, p. 105.

(c) 7 Scott, N. R. 663.

(d) 2 W. R. 213.

(e) 2 W. R. 244.

(f) 2 W. R. 21.

(g) 2 W. R. 521.

(h) 6 N. of C. 596.

(i) 2 Hagg. 253.

(k) 1 W. R. 447.

(l) 2 W. R. 305.

(m) Vol. 2, p. 579.

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action *bonâ fide* and fails, the defendant has no redress except costs (a). In *Mitchell v. Jenkins* (b), Parke, J., says as follows : —“ I have always understood, since the case of *Johnstone v. Sutton*, which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz., that the prosecution or arrest was malicious and without reasonable or probable cause : if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable ; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved.” So in *Wuterer v. Freeman* (c), it is said, “ But now to the main point, we hold, that if a man bring an action upon a false surmise in a proper Court, he cannot bring an action and charge him with it as a fault directly, and *ex diametro*, as if the suit itself were a wrongful act, for *executio juris non habet injuriam*. And as all by nature is good (so Saint Paul saith) the law is good if a man use it lawfully ; so the abuse of law is the fault.” And the same rule appears in *Bird v. Line* (d). In *De Medina v. Grove* (e), the Court held that proof of malice was necessary in an action for issuing a *fi. fa.* indorsed to the full amount of the judgment debt, when part had been satisfied by payment. In *Davies v. Jenkins* (f), Rolfe, B., considering the case of a person being wrongfully sued and having execution levied upon him, his name being identical with the real debtor of the plaintiff, observed, “ The defendant so wrongfully sued would have had a good defence to the action, and have recovered his costs. If it be asked what further remedy he would have had for the inconvenience and trouble he has been put to, the answer is, that in point of law, if the proceedings have been adopted purely through mistake, though injury may have resulted to him, it is *damnum absque injuria*, and no action would lie. Every defendant against whom an action is unnecessarily brought experiences some injury or inconvenience beyond what the costs will compensate him for.” The action of trespass against the sheriff is allowed on grounds of public policy, as a security against the abuse or careless exercise of his great powers. Lastly, the damages here sought to be recovered were caused by the Appellants’ own *laches* in not bailing their ship.

Addams, Q.C., in reply.

(a) Co. Litt. 161 A., & Hargrave’s
note.

(b) 5 B. & A. 594.

(c) Hob. 266.

(d) Comyn’s R. 190.

(e) 10 Q. B. 168.

(f) 11 M. & W. 755.

The Right Hon. T. PEMBERTON LEIGH :—The Respondents in this case brought an action against the Greek brig the Evangelismos, of which the Appellant is owner, for damage sustained by the ship of the Respondents in a collision. They failed to establish their case, and the action was dismissed with costs. The Appellants claimed not only to have the suit dismissed, but to have costs and damages awarded to them for the detention of their ship while under arrest. That question is now raised before us in appeal, the learned Judge of the Court below having in chambers refused to allow damages.

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It is urged by the Appellant that damages ought to have been awarded in addition to costs, according to the practice of the Admiralty Court, because the arrest was improper. On the other hand it is said that the arrest of the ship was the foundation of the action, and therefore was not an illegal or improper act. Their Lordships think that there is no reason in this case for giving damages. Undoubtedly, if the arrest of the ship is an act of *mala fides*, or of that *crassa negligentia* from which the law implies malice, the Court of Admiralty would be justified in giving damages, as in an action brought at common law damages might be obtained. In the Admiralty Court however the proceeding is very convenient, because in the action in which the main question is disposed of damages may be awarded.

If the arrest had been *mala fide* or *crassa negligentia*, damages would have followed.

The real question in this case comes to this :—Is there, or is there not, reason to say that the action was so unwarrantably brought, or brought with so little colour, so little foundation, that it implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it? Their Lordships are of opinion that there is nothing whatever to establish the Appellant's proposition. It is true the identity of the vessel was not proved; but there were circumstances which afforded ground for believing that the Evangelismos was really the vessel which came into collision with the Hind.

But here there is no malice or *crassa negligentia* proved.

Their Lordships, therefore, will affirm the judgment of the Court below; and they would have given costs, but inasmuch as the Appellant had not an opportunity in the Court below of addressing the observations to the learned Judge which they have had in this Court, we think that the appeal ought to be dismissed, but without costs.

Judgment affirmed, but without costs.

Rothery, proctor for the Hind.

Clarkson, proctor for the Evangelismos.

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August 5.*In the High Court of Admiralty.***THE MARGARET MITCHELL, STILES, Master.**

Possession—Sale of Ship by Master abroad—Necessity—Sale by Power of Attorney, and Title of Purchaser thereunder—Parol Revocation of Power—Effect of Colonial Decree of Grantor's Insolvency—Conflicting Titles pleaded together.

The sale of a ship by the master abroad without the consent of the owner can only be justified by proof of urgent necessity. Circumstances showing such necessity considered.

A power of attorney to sell a ship may be substantially revoked by parol; and the attorney selling thereafter is guilty of a breach of trust.

If the grantee of a power of attorney to sell a ship sells fraudulently, or so as to commit a breach of trust, the fraud of the attorney vitiates the title of the purchaser, if the fraud was known to him, or could have been known by reasonable inquiry. Circumstances constituting fraudulent sale, and circumstances putting purchaser on inquiry, considered.

Sembla. The owner of a ship receiving the proceeds of a sale of the ship by the master abroad, is estopped from disputing such sale, and so are parties deriving title under him with knowledge of the facts.

Sembla. A power of attorney to sell a ship given to the master (among other reasons) by way of security to cover his advances, does not justify him in selling against his owner's consent, except in case of necessity.

Sembla. A power of attorney to sell a ship is not revoked by a decree of the grantor's insolvency in a colonial possession, so as to invalidate a *bond fide* exercise of the power before notice of the insolvency.

Sembla. A party claiming title to a ship will not be allowed to rely on two conflicting titles.

The master of a ship, without authority from the owner, but under stress of necessity, sold her at Shanghai to R., and transmitted the proceeds to the owner. R. repaired the ship at Shanghai, and at Whampoa appointed S. to command her, and gave him a power of attorney authorizing him to sell. S. sailed the ship to Europe, and ultimately, in spite of letters from R., advertised her for sale by auction in London, R. being then insolvent under a decree of Her Majesty's Consular Court at Shanghai, though S. was unaware of that fact. The advertised sale was prevented by the arrest of the ship at suit of M., her original owner. Messrs. Mo. and T. then took a bill of sale of the ship for 4,000*l.* from S., as attorney of R., and another bill of sale for 1,200*l.* from M., the value of the ship being probably at least twice those amounts. Soon after the ship was arrested by the assignees of R. *Held*, that the sale at Shanghai was justified by the necessity of the case, and had legally divested the property from M., the original owner, vesting it in R.; and that, under all the circumstances of the case, Messrs. Mo. and T. had no good title under the bill of sale from S. as the attorney of R.

THIS was a cause of possession, instituted by the assignees of the estate of Peter Felix Richards, lately trading at Shanghai, and opposed by Messrs. Morice and Towne, of London.

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The Margaret Mitchell left Glasgow in December, 1853, being then owned by Thomas Mitchell of that city, under the command of Thomas Jameson. In April, 1855, she arrived at Shanghai in China, having previously been aground off Woosung and thereby sustained considerable damage. On attempting to enter the dock she again grounded, and received further damage. Ultimately Jameson, the master, being unable to obtain any funds by bottomry or otherwise, and acting under the advice of the consignees of the charterer and of Lloyd's agents, sold the ship on the 16th of April, 1855, to P. F. Richards, for about 4,000*l.*, and remitted the proceeds to Mitchell. At Shanghai, and afterwards at Whampoa, Richards laid out large sums of money in repairing her, and appointed Dewar Stiles to be her master, to whom he gave a power of attorney in the following words:—"Whereas I, P. F. Richards, am desirous of appointing Dewar Stiles master of the ship Margaret Mitchell, now in China, to act for me in my shipping affairs in Victoria and other place or places, from time to time, and for the purpose after mentioned: Now know ye, that I, the said P. F. Richards, do hereby make constitute and appoint in my place the said Dewar Stiles my true and lawful attorney and agent, for me and in my name to contract for, buy and sell, pledge any ships or vessels in which I may be interested, and to effect insurances of ships' freights, goods, or other interests, to load, ship, consign, and receive and take possession of goods and merchandize, and also to sign seal and execute all bills of sale, transfer of vessel, and all bonds, deeds or instruments, at the customs or elsewhere, and to sign seal or execute, all and every usual and customary shipping transfer, contracts, engagements, guarantees or undertakings, which I, the said P. F. Richards, may or might from time to time be called or required to sign or execute; and I do hereby give to my said attorney my full authority in the premises, hereby confirming whatsoever shall be lawfully done in the premises. In witness whereof I have hereunto set and affixed my seal this 15th day of September, in the year of our Lord 1855. P. F. RICHARDS." (L. S.)

The vessel sailed for Europe under the command of Stiles. On the 15th of May, 1856, Richards was declared insolvent, by decree of her Britannic Majesty's Consular Court at Shanghai, and assignees of his estate were appointed. In the beginning of June, 1856, and before notice of Richards's insolvency reached this country, Stiles, who had brought the ship to London, finding that Richards's agent refused to take charge of

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her, and being without funds, and being, as he alleged, a creditor of Richards, caused notice of the intended sale of the ship by auction on the 11th of June, to be inserted in the public papers. He had previously received two letters from Richards, to the effect that Richards was dissatisfied with him, and intended to deprive him of his command. The sale was prevented by the arrest of the ship at the suit of Thomas Mitchell, her original owner. On the 13th of June, under circumstances sufficiently detailed in the judgment, Messrs. Morice and Towne took a bill of sale of the ship from Stiles, as the attorney of Richards, for 4,000*l.*, and another bill of sale from Mitchell for 1,200*l.*; whereupon Mitchell abandoned his suit. On the 27th of August, 1856, the ship was arrested in the present suit by the assignees of Richards; in answer to which Messrs. Morice and Towne asserted their right under the bills of sale. The assignees relied on the validity of the sale at Shanghai by Jameson to Richards, and on the illegality of the subsequent sales by Mitchell and Stiles.

The *Admiralty Advocate* and *Deane*, Q.C., for the assignees.

On the question of the effect of Richards's bankruptcy, they quoted *Story, Conflict of Laws* (a); *Shaw's Bell* (b); *Sill v. Worswick* (c); *Phillips v. Hunter* (d).

Addams, Q.C., and *Twiss*, Q.C., for Messrs. Morice and Towne.

On the 5th of August DR. LUSHINGTON pronounced the following judgment:—

Judgment.

The question to be decided is, who is entitled to this ship? In a cause of possession the Court is empowered by statute (e) to try the question of title.

The claimants.

The claimants are, on the one hand, the assignees of Mr. Richards, who contend that he became the owner of the ship by purchase at Shanghai, and that his title has never been lawfully divested, except according to the decree of her Majesty's Consular Court at Shanghai, whereby it became vested in them as his assignees; and, on the other hand, Messrs. Morice and Towne, who allege, 1st, that Mr. Richards never had any lawful

(a) Ed. 1846, par. 403—407.

(c) 1 H. Bl. 665.

(b) Ed. 1858, p. 1294.

(d) 2 H. Bl. 402.

(e) 3 & 4 Vict. c. 65, s. 4.

title to this vessel ; 2ndly, that if he had, his title has been lawfully divested and conveyed to them, Messrs. Morice and Towne, by the act of his duly authorized attorney ; and, 3rdly, that upon the assumption that Mr. Richards had no title, they have a conveyance from Mr. Mitchell, the former owner, whereby all his right is vested in them, Messrs. Morice and Towne.

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It has been urged in argument on behalf of Messrs. Morice and Towne, that they might, if they had thought fit, have relied upon the sale by the attorney of Mr. Richards, and not entered into the question whether Richards had a title or not : and certainly it is true that if the title of Richards, be it good or bad, was divested out of him lawfully by the act of his attorney, Messrs. Morice and Towne would have no occasion to put in issue the legality of Mr. Richards's title. But this is not the course which has been pursued on behalf of Messrs. Morice and Towne in the pleadings, for in defence to the action of Mr. Richards, they have most distinctly denied his title, and alleged that the sale to him was fraudulent, illegal and void. Moreover, they have taken a title from Mr. Mitchell, which title was nothing worth, except on the presumption, that the sale to Richards was illegal and void ; and they have registered the ship according to the bill of sale from Mitchell. So that in fact the defence of Messrs. Morice and Towne is this :—“ We purchased from the attorney of Richards, whose title we then considered doubtful, and now deny. In order to protect ourselves, we have since taken a title from the original owner ; and we now especially rely upon that title, for we allege that Richards had no title at all.” A defence so framed is, so far as I know, totally without a precedent ; it is a defence founded on two opposite and conflicting titles. Both bills of sale purport to convey the whole vessel ; both cannot be valid. Mitchell could have no title to convey, except the sale to Richards was void. The attorney of Richards could have no title to convey, unless the sale to Richards was valid. This state of things gives rise to important questions ; the first of which is, whether it be competent to a party to rely upon two irreconcilable titles. I must say that I have very great doubt whether it be competent to a party who has taken a title from the original owner, and registered his ship accordingly, and who has denied the title of the purchaser, alleged it to be no title at all, and has put the validity of that title in issue, to turn round and claim under a conveyance from that very purchaser whose title he has denied. Greatly as I doubt the competency of Messrs. Morice and Towne to rely upon two

The defend-
ants rely on
two conflicting
titles ;

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defences repugnant and contradictory, I will proceed to consider them both, and examine how far they can be sustained in law and in fact.

Was the sale at
Shanghai by
the master
valid?

The first issue to be tried is the validity of the sale to Richards, at Shanghai. There is, however, another question which cannot be passed by, connected with the one I have stated, namely, whether under the circumstances Mr. Mitchell, the original owner, under whom Messrs. Morice and Towne now claim, could lawfully convey any title to this ship by reason of his having precluded himself by previous acts done—I allude to his acceptance of the price of the sale to Richards, and his receipt of money under the policy of insurance.

The sale of a
ship by the
master abroad
must be just-
ified by proof of
urgent neces-
sity.

I will begin with the first of these questions, and examine what the law requires to render a sale of a ship by a master abroad valid. This inquiry will occupy very little time, for it is only necessary to refer to the very first chapter of Lord Tenterden's work on Shipping. It is clear from the authorities there cited, that though in early times the validity of a sale by a master in a foreign port was doubted, yet now the master has an implied authority (to use the words of Lord Ellenborough) "to sell in cases of extreme necessity, and in those only." It appears further, that whoever purchases under a title of this description, must, to defend that title, be prepared to prove the necessity. A decree of a Vice-Admiralty Court, ordering the sale, will not avail, the authority of a Government officer will not, nor I apprehend any order from any consular authority; not that these circumstances would not form a part of the proof of the necessity, but they would not be sufficient *proprio vigore*. Then what constitutes a necessity? It is impossible to give an answer in the form of an exact and concise proposition. It is not sufficient (to avail myself of Lord Gifford's expression) that the sale is "*bonâ fide*, and for the benefit of all concerned," unless it be also shown that there was urgent necessity for the sale being resorted to. All the ingredients which may constitute necessity cannot be enumerated; some may. The want of repairs, and the degree of want; the possibility of procuring the repairs at the port where the ship lies; the expense of repairs; the expense of remaining in port; the want of funds or credit; the impracticability of communicating with the owner: these and other circumstances may, in combination, constitute the necessity the law requires, for that necessity cannot mean absolute compulsion in a physical sense.

Circumstances
tending to con-
stitute such
proof.

What is the necessity alleged in this case? First, the want of repairs. The first and most important evidence on this head, to which I shall refer, is the affidavit of Jameson the then master. I will afterwards examine how far he is contradicted or supported by other evidence. As to his credit, he has given a long detail of the transactions of this ship; he has appealed to Mr. Mitchell for his character and conduct, and Mr. Mitchell has made no affidavit in contradiction; he is therefore fairly intitled to credit in all matters, at least where he might, if he deposed falsely, have been contradicted by Mr. Mitchell, and is not. The degree of credit due to Mr. Jameson is most material, and therefore I must examine this part of the case with great care and minuteness. It appears from Jameson's affidavit, that this vessel left Glasgow in December, 1853, bound to Bombay with coals and merchandize; that part of the freight was paid beforehand, and the balance was subsequently remitted by him to the owner; that at Bombay the ship was chartered to load at Canton, and took thither a cargo of cotton, which produced a freight of 3,000*l*. That at Canton difficulties arising as to the shipping of a cargo from that port, the destination was changed to Shanghai; that in consequence of the arrangements made on this change of voyage, the sum of 4,500*l*. was paid, so that 7,500*l*. was remitted to the owner, besides the balance of freight on the outward voyage. It is clear therefore that the owner, Mr. Mitchell, received from the master, independent of other sums, above 7,500*l*. for the earnings of this ship in little more than one twelvemonth. On the 1st of February, 1855, the ship being under the charge of a pilot, grounded near Woosung, and her cargo was thereupon discharged. On the 4th of April the ship was got afloat, and brought by a steamer into Shanghai. What took place in the interval between February the 1st and April the 4th is not very distinctly stated, but it is not of great importance. The ship struck the ground again at the entrance of the dock, and received further damages. Jameson states that whilst the ship was on the bank at Woosung, and afterwards in dock, he had surveys made, and applied for advice to the consignees of the charterer and to Lloyd's agents. It does not appear from this affidavit, nor from any proceedings in this case, so far as I can discover, that the owner had any agent at Shanghai, or that the master was provided with any credit at that place, or anywhere in its vicinity. I apprehend that, under such circumstances, the master resorted to the best means in his power to obtain advice for the regulation of his conduct. The consignees of the charterer were the persons to protect the interests of the charterer, and to enable the

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Evidence of necessity in the present case.

The master's affidavit states:
1. Need of repairs.

2. No power of raising money.

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3. Ruinous to wait for communication with owner.

4. Sanction of Lloyd's agent, consignee of charterer and others to sell.

5. Sale by auction.

This affidavit, if true, proves necessity.

Credibility of the master examined.

1. By surveys, &c.

master to fulfil the charter if practicable; the duty of Lloyd's agents was to protect the interests of the insurers, and that duty necessarily includes the duty of preventing the ship from being unnecessarily abandoned or sold, or incurring expenses for which the insurers would be liable. A specification of the repairs was then made out, and advertisements for tenders were circulated. The master states that there were at Shanghai only two persons who could do such repairs, Mr. Dewsnap and Mr. Rogers; that their estimates were for 40,000 and 42,000 dollars, and that the vessel, when repaired according to such estimates, would not be warranted to pass Lloyd's surveyor; that the consignees refused to advance money; and that he, the master, advertised for bottomry in vain. The master then states the expense and risk of keeping the vessel on the beach—as for keeping her in dock I will say a word presently—until he could hear from his owner. He advised with Lloyd's agent and with Jardine, Matheson & Company, a well-known house of trade, and they all advised him to sell. A sale by auction, in lots, was then advertised. Richards was the highest bidder for the hull, but by the advice of Captain King, who had surveyed the ship, it was bought in; Captain King however found no more could be obtained, and, after a communication was made to the agents of the charterer, Richards's offer was finally accepted. The proceeds were paid to the agents of the charterer, who remitted them to the owner, Mr. Mitchell. It is true that this is the statement of the master, who must be strongly biassed to support his own act. But if this statement be true, I think that no reasonable doubt can be entertained that the sale was justified by the necessity, for the only alternative was to beach the vessel and wait some eight or nine months for orders from the owner; in the interim the vessel must have been so deteriorated as to be nothing worth.

But all this depends upon the credit to be given to the master's affidavit, and I propose to try that credit—1st. By the documentary evidence in support of it. 2nd. By the affidavits of witnesses. 3rd. By the documentary evidence alleged to contradict it, and by the affidavits of those who impugn the statement. I will first direct my attention to the exhibit annexed to the answer. The surveys, specification, estimates and advertisements for bottomry must be considered evidence for both parties. It would be quite vain to comment upon the contents of some of those documents; I should hesitate to draw my own conclusions from the recital of particular damages. The first three of these docu-

ments show that the surveys were made with the approbation of the consignees and by Captain King, who was selected as surveyor by Lloyd's agent. Then comes a statement of the repairs necessary, made by Rogers, a shipwright, and Brown, the carpenter of H.M.S. Encounter. Then follow the circulars for tenders and the specification: the tenders for 40,000 and 42,000 dollars; the advertisement for bottomry for 46,500 dollars to pay for the repairs and fit the ship for sea; and lastly, the survey of Captain King, who was, as I have said, appointed by Lloyd's agents. The purchase took place on the 27th of March, 1855. The subsequent survey I will notice in its proper place. Assuming, for the moment, that these are genuine documents, it cannot be denied that they are most important evidence to sustain the affidavit of the master, Jameson. What letters Mr. Mitchell received I do not know, none are produced in this cause; but Jameson has sworn that he wrote to him by every mail. I must and ought to presume that none can be produced militating against the statement of the master and impugning the validity of this sale: I must presume this, because Mr. Mitchell has conveyed the ship to Messrs. Morice and Towne, and is bound to support his title so to do; moreover, the Court would, if application had been made on the part of Messrs. Morice and Towne, have enforced, so far as it could—Mitchell being in Scotland—the production of these letters.

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I will now refer to the affidavits of persons then at Shanghai, who had actual cognizance of these transactions or some of them. Mr. Dewsnap deposes that, had the ship remained in dock at Shanghai, the dock dues would have amounted to more than she was worth. The dues, it is said, were 30*l.* per day. He also deposes to the truth of the estimates, and to the fact that money could not be procured on bottomry. Mr. Brine is the auctioneer who put the ship up to sale: he deposes that no person would make an advance on bottomry; that the rate of interest was 24 per cent.; that the dock dues were 30*l.* per day; that the sale was perfectly fair; and that the whole proceeds of the sale were 20,000 dollars, a dollar being 6*s.* 8*d.*, that is nearly 7,000*l.* Landers is the surveyor of shipping to Lloyd's agents at Shanghai: he made a survey whilst the ship was lying on the bank, not of much importance; but as to the general state of things at Shanghai his evidence deserves great consideration. He deposes that even if the vessel had not met with the subsequent damage at the dock she would have been so detained that it would have been scarcely possible for her to have got a full

2. By affidavits supporting surveys.

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cargo, even at a lower rate of freight; that the cost of labour and materials was fearfully high at Shanghai; that the surveys were made by persons of high respectability, and that if the advances necessary amounted to 30,000 or 40,000 dollars no one would have advanced it, and the only prudent course was to sell the ship. Captain King is commander of the receiving ship of Dent & Co., and a surveyor of shipping: he says that the estimates were not excessive; that Jameson advised with him and he advised him to let the ship be sold by authority of the Court; that it was quite impossible to procure the money; that the master acted by the advice of Smith, Kennedy & Co. to sell the ship by auction; and that the whole transaction was perfectly honest and straightforward. Ranken is a partner in the firm of Smith, Kennedy & Co.: he says the whole of the proceedings were straightforward, honest and fair; that it was impossible to raise the money on bottomry or otherwise; that Lloyd's agents were specially invited to watch the transaction, and were represented at the sale. I do not think it necessary as to this part of the case to refer to the affidavits of Mr. Richards himself. It is abundantly clear that the statement of the master in his affidavit as to all the circumstances preceding and attending the sale, is borne out by the documents and affidavits I have referred to—affidavits coming from persons thoroughly cognizant of all the transactions, of all the peculiar circumstances existing at Shanghai, and in situations of apparent respectability.

3. By adverse documents and affidavits.

This, however, is a view of one side of the question only. I must now look to what is pleaded on behalf of Messrs. Morice and Towne, and to the proof offered in support of it. It is alleged by them that the vessel was chartered to load at Shanghai a cargo of tea at 7*l.* per ton; that Jameson procured excessive and fraudulent estimates and surveys, and that he illegally and fraudulently sold the vessel. Now, certainly, if these averments are proved by the evidence produced, it will be impossible to sustain the sale, and it is equally clear that though the *onus probandi* of the necessity of the sale lies upon the party relying upon the validity of the sale, yet, where fraud is charged, the party alleging the fraud is bound to substantiate it by evidence. This brings me to inquire what evidence has been produced to prove the fraud. As to documentary evidence, I cannot discover any document of any kind pertinent to this issue, that is, bearing date antecedent to March, 1855, the time of the sale to Richards; and such documents alone could have a stringent bearing on the case. But it would appear that reliance

Fraud alleged must be proved.

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is to be placed upon three surveys which were made at the instance of Mr. Richards at Whampoa in April and May 1855, after he had purchased the vessel. For what purpose were these surveys and estimates made? I have no direct information upon this head in any instrument whatever; there is no paper which states whether the repairs intended to be done were to put the ship into a condition to take a cargo on board, or for some other and more limited purpose. I have no other documentary evidence, that I am aware, produced on behalf of Messrs. Morice and Towne; and when I inquire for the evidence in the shape of affidavits applicable to this transaction, I find that there is no affidavit whatever from any person who was at Shanghai, or had any personal cognizance of this transaction, unless Captain Stiles is in any degree to be so considered. To the affidavit of Captain Stiles I am now about to advert. This person, though at Shanghai, with opportunities of acquiring information, does not appear to have had any personal cognizance of this transaction, and the whole of his statement, so far as relates to this part of the case, is grounded upon information and belief, and information, too, coming from a quarter not disclosed. He swears, I observe, nearly in the terms of the act upon petition, a mode of deposing which does not intitle him to any particular credit from the Court, and more especially when he charges another with gross fraud in a transaction of which he does not say he had personal knowledge. It is perfectly evident that even if Captain Stiles were intitled to entire credit, of which at present I say nothing, that this hearsay evidence cannot for a moment be put in competition with the written and oral testimony upon which I have previously commented. It may be right, however, to observe, that much argument was founded upon the price given by Mr. Richards for this vessel, and the amount of repairs which were subsequently done by him at Shanghai and other places. Now I am of opinion that all this evidence has but a very remote bearing upon the question, that question being whether Mr. Richards gave the highest price which could be obtained for the vessel at Shanghai. The price actually given for the ship, and all belonging to her, approached the sum of 7,000*l.*, and is proved by all who could give any evidence upon the subject, to have been the utmost that could be procured at Shanghai. No doubt it was a speculation on the part of Mr. Richards, and money at Shanghai being worth 24*l.* per cent., he hoped to make a corresponding advantage by his purchase if successful; but looking at the risk which was necessarily run, he was justly intitled to such advantage. I decline, therefore, entering minutely into a consideration of the various

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repairs done, and money expended, by Mr. Richards, I think they have too remote a bearing upon the question for decision, to require me to enter minutely into particulars; but, according to Richards's account, a very large sum of money was expended. The fears expressed by Richards, that the sale might be impugned by the former owner, were also urged as a proof the transaction was unfair. I can draw no such conclusion, because whoever buys a ship from a master, knows that to substantiate his purchase, he may be compelled to prove the necessity of the sale, a burden which might well excite fear in the most honest purchaser.

Semble. Mitchell having received the purchase-money would be estopped from disputing the sale; and a person claiming title from him is estopped likewise.

And now, before I pronounce the judgment I have formed upon this part of the question, I think it right to cast an eye to the position in which Messrs. Morice and Towne stand. With respect to this sale they can be in no better position than Mr. Mitchell himself, through whom they are now claiming, and I will consider for a moment how Mr. Mitchell stands. Mr. Mitchell has received the balance of this purchase-money, and he has acknowledged the receipt for the same without ever questioning the validity of the transaction; he has moreover received, as is admitted, 65*l.* per cent. from the insurers, and 1,200*l.* from Messrs. Morice and Towne, as their purchase-money for this vessel; he has not impugned the facts stated in the affidavit of Jameson, the master; he has not imputed fraud to him, and he has made no affidavit in this matter. It is, I think, very questionable, whether Mitchell could have contested the validity of this sale for his own benefit.

Recapitulation: the sale by the master valid.

Upon a review of the whole evidence, I am clearly of opinion that the necessity for the sale of this ship has been fully established. There was no alternative save to leave her upon the beach for eight or nine months, at great risk of utter destruction, for that time must have elapsed before orders could have been received from the owners; to have left her in dock would have been certain ruin, for if the expense were 30*l.* or even 15*l.* per day, it must have consumed the whole value; large repairs were indispensably necessary; no money could be procured on bottomry or otherwise; the best advice was taken, especially that of Lloyd's agents; the sale was honestly, justly and fairly conducted. These facts are all proved. I am therefore of opinion that all the requisites of the law were complied with, and that the validity of the sale must be upheld.

As to the title

I have now to address my attention to a very different ques-

tion, one, indeed, singularly contrasted with the preceding; for with reference to the preceding, Messrs. Morice and Towne urged that Richards had no title at all; that all his proceedings with relation to this ship were fraudulent and of no effect; so it was pleaded, so attempted to be proved, and so argued; but the claim now to be considered is founded upon a basis the very reverse of the former. They now derive their title from Richards, and therefore admit that his purchase was lawful, and they say that being so lawfully intitled, he has conveyed the ship to them by his agent. The sale in question was made under a power of attorney, dated 15th of September, 1855, granted by Richards to Dewar Stiles, whom he had appointed master of this vessel, and who brought her from China to this country. It is a proposition of law which I apprehend every lawyer must admit, that a sale made by an agent, duly authorized by power of attorney, cannot be disputed by the grantor of the power on the ground of want of authority; but that rule, though indubitably true, does not dispose of this case, for it does not follow from that proposition that all sales made by an attorney are valid. There are many circumstances which might invalidate a sale made by an attorney; for instance, great inadequacy of price, collusion by the attorney with the purchaser, and many other circumstances which it is not necessary to enumerate. It is my duty to look at the whole facts and evidence in this case, and then to determine whether the sale be valid or not. I will observe, however, that nothing which passed between Richards and Stiles can be urged against the purchasers, provided it was unknown to the purchasers, or could not have been known by reasonable inquiry. In other words the proposition is this, that supposing Stiles to have acted improperly or dishonestly towards his principal, the purchaser cannot be affected by such conduct if he was ignorant of the same, and was not called upon by circumstances to make inquiry.

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of the defendants through Stiles, the attorney of Richards.

A fraudulent sale under a valid power of attorney is not invalid against the purchaser, if ignorant of the fraud, and not called upon by the circumstances to make inquiry.

I am now under the necessity of stating as clearly, but as concisely as I can, the circumstances of the connection of Stiles with this ship, and the facts preceding and attendant on the sale, and herein I propose to consider whether Stiles was justified in making this sale as relates to Mr. Richards, though the sale might, under circumstances, be valid, even if he were not justified. The statement in the pleadings on behalf of Messrs. Morice and Towne is as follows:—That the vessel having arrived at Whampoa, Richards not having funds sufficient for a lengthened voyage, arranged with Stiles to advance the necessary funds for that purpose, and to assume the command. That on the 15th of

Statement of the defendants as to the circumstances of the purchase from Stiles.

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September, 1855, Richards executed the power of attorney as a security for the payment of advances made or to be made by Stiles on account of the ship. That the ship then proceeded from Whampoa to Batavia, thence to Amsterdam and London, where she arrived on the 23rd of May, 1856. That Stiles then offered to give up the vessel to the agent of Richards, Mr. Lea; that Mr. Lea refused to receive her; that Stiles being without funds determined to sell her. It is then stated that on June the 2nd, Stiles placed the vessel in the hands of Messrs. Rayden and Reid for sale, and she was advertized to be sold by auction on the 11th of June, 1856; that Messrs. Morice and Towne made inquiries of the auctioneers,—but whether of Stiles also at the same time, I know not; that they ascertained that Mitchell *was* the sole owner, and registered as such,—(I presume that it is not intended that this should be understood literally; it must mean *had been* the sole owner, for otherwise Messrs. Morice and Towne could not have acted as they did with any chance of justification). The answer then continues, that there was no indorsement on the ship's certificate of registry of the transfer to Richards, and of a mortgage, and that the defendants declined the purchase after certain inquiries; and that on the 10th of June Mr. Mitchell entered an action against the ship in this Court, and she was arrested the same day. The passage which follows in the answer deserves particular attention: it states—That Stiles informed Messrs. Morice and Towne that he had no means of defending the suit, that he could not in all probability do so, that he suggested Messrs. Morice and Towne should apply to Mitchell to purchase his interest in the ship, and then purchase the interest of Richards, if any—I must here observe (though I must refer to the same passage hereafter) that I have expected in vain some explanation of what is meant by the term “interest,” as applied to Mitchell, for the fact plainly is, that Mitchell was intitled to the ship as owner, or had no interest at all; he had no other interest but as sole owner. The answer then states, that accordingly Messrs. Morice and Towne negotiated, and on the 13th of June Stiles transferred the ship, as attorney of Richards, by bill of sale, free of all incumbrance, save the interest of Mitchell and the mortgage, for the consideration of 4,000*l.*; and by another bill of sale, Mitchell transferred the ship for 1,200*l.* Then follow these words, “and Clarkson denied that Richards either now is, or ever was, the lawful owner of the said ship.”

Reply of Mr.
Richards, the
plaintiff.

It is now my duty to consider how far this statement, which comprises the whole case of Messrs. Morice and Towne, is con-

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tradicted on behalf of Richards. It is manifest that as to a large and most important part of the case so pleaded on behalf of Messrs. Morice and Towne, Richards can say nothing; he could have no cognizance of the transactions in London which led to the sales as pleaded, nor of the sales themselves; he was abroad and ignorant of the whole proceedings. So far as the decision may depend upon such transactions, it must be governed by the facts pleaded and otherwise proved; in fact, Richards's answer can only apply to antecedent circumstances, and those of secondary importance, as relates to the validity of this sale. However this may be, I think I ought not to pass by this part of the case wholly unnoticed, namely, the reply. The reply denies that Richards arranged with Stiles to advance money for the fitting out of the ship, or that he gave the power of attorney as a security for the repayment of money advanced; and other reasons are then alleged for the giving this power of attorney. It further states that Stiles agreed to take one-eighth of the ship; that when this power of attorney was given instructions were also given not to sell for less than from 10,000*l.* to 13,000*l.*, unless in case of absolute necessity. The reply continues, that being dissatisfied with Stiles's conduct, Richards, in November 1855, determined to remove Stiles and to cancel the bill of sale, and accordingly sent a power of attorney to Mr. Lea in England to act accordingly. That on the 7th of December, 1855, he sent a letter to Stiles, informing him of his intention to remove him, and of the power of attorney sent to Lea; and that on the 15th of January, 1856, he sent a letter directing him to make over the ship to Lea. It is then alleged that those letters were received by Stiles, at Amsterdam, in April, 1856; and the fact of their being so received is admitted. The reply then sets forth a letter from Stiles to Lea, dated May 23, 1856, which expresses the determination of the writer, if Lea will not take the ship and discharge his accounts, to sell the ship to realize his claims approaching to 3,000*l.*; that Lea refused to take charge of the ship. Then follows a letter which may be of considerable importance,—a letter from Stiles to Richards, at New York, dated London, June 6, 1856; and it may be well to observe that when this letter was written the vessel had already been placed in the hands of the auctioneers. The letter states that the writer was aware of the intention to dismiss him; complains of the representations against his character; states that on Richards's arrival in England he shall make him responsible; states Lea's refusal to take the ship as ancient, and that the ship will be sold by public auction. It is then further pleaded that the ship was worth 10,000*l.*; that Stiles and Messrs. Morice and Towne knew the

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mortgage had been paid off; and it is further alleged that Messrs. Morice and Towne were privy to the circumstances herein pleaded.

Rejoinder.

There is a very long rejoinder to this plea; the substance of this rejoinder, so far as relates to this part of the case, I will endeavour to state. 1. It admits that Stiles intended to purchase an eighth of this ship, but only if Richards could give him a good title. 2. Denies that the power of attorney given to Stiles was revoked by the power sent to Lea or otherwise. 3. Denies that the ship was worth 10,000*l.* under the circumstances in which she was placed. 4. Denies that Stiles or Messrs. Morice and Towne knew that the mortgage was paid off. 5. Denies that Messrs. Morice and Towne were privy to the circumstances as alleged. It is quite obvious that nearly the whole of the circumstances set forth in these pleadings cannot affect Messrs. Morice and Towne unless they were cognizant of them, still it is not unimportant to ascertain how far the statements on behalf of Richards or Stiles are founded in truth; or, to put the proposition in other words, whether Stiles was justified in selling the ship. It may be very difficult to ascertain the truth of those facts, the only evidence being the letters produced and the affidavits of Stiles and Richards. The first letter, dated 26th September, 1855, from Richards to Stiles, states that he, Richards, proposed to transfer one-eighth of the ship to Stiles, the cost being made up as therein stated. Letter, No. 2, from same to same: Richards offers to sell to Stiles one-eighth, or less, of the ship; at that time he expected the debts of the ship would be cleared. Letter, No. 3, shows the ship had been mortgaged, I presume at Hong Kong. Letter, No. 4, is from Richards to Lea, his agent at Reading: it states that a power of attorney is inclosed, giving Lea full authority to act as to the ship. This letter admits that Richards was a good deal in debt to Stiles. Stiles paid some of his own money at Canton, and through Mr. Morice effected insurances at his own expense. This letter gives directions for the settling of all accounts with Stiles; it further states that the mortgage for 1,300*l.* will be cleared at Batavia. At the conclusion of the letter the writer states that he has made up his mind to discharge Stiles and appoint Captain Fawcett. Letter, No. 5, is a long letter to Lea; but I am not aware that there is anything of importance in it bearing on the present question. The writer desires Lea, if the ship wants great repairs and he is embarrassed, to lay up the ship till his arrival: in the postscript he desires him to get the original bill of sale from Captain Stiles, and if Stiles requires a guarantee for the amount

Was Stiles justified in selling the ship under the power of attorney?

Evidence on this point considered.

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due to him, to do so from the freight. Letter, No. 6, to Lea, states that he may sell the ship for 14,000*l.* to 16,000*l.*, and that as Lea has no power of attorney he, Richards, will be home in time. Letter, No. 7, to Lea: the writer says he shall be home soon after that letter reaches, and states that the mortgage on the ship is cleared. Letter, No. 8, New York, 30th June, 1856; Richards to Lea: Richards has received accounts of Stiles proceeding to sell the ship. Letter, No. 9, gives power of attorney to Lea to settle ship accounts and remove the master; the power is dated 28th November, 1855. Letter, No. 10, from Messrs. Thompson, of London, to Stiles, dated 14th July, 1856, states they had received a deed of revocation of the power of attorney granted to Stiles. I have thought it right to notice this correspondence, but it cannot, of course, affect the purchasers; nor, as to many of the facts, Captain Stiles: and is useful only as showing certain circumstances connected not immediately with the sale, but with the transactions preceding. I am now about to advert to the correspondence between Richards and Stiles, and that is of a much more important character with reference to the issue in this cause. The first is a letter dated Shanghai, the 7th of December, 1855, from Richards to Stiles, and, as appears by Stiles's letter, received by him at Amsterdam in April, 1856. From this letter it appears clear that there had been correspondence respecting the proposal that Stiles should take a share in the ship, and that from some misunderstanding as to the cost it was at an end: it then states that Lea had authority to settle all accounts with Stiles, and that he, Richards, means to appoint a successor. The effect of this letter is, I think, important; it is certainly not a legal revocation of the power of attorney Stiles held, but it is a clear intimation that Stiles was to be no longer master; whether with such an intimation of intended discharge he was justified in selling the ship, is one of the questions to be hereafter solved. Next, there is a letter from Richards to Stiles, dated Shanghai, January, 1856, which was also received in April, 1856. This letter declares the intention to settle with Stiles and dismiss him, to take the ship and lay her up; it also states that the mortgage is settled. I am not aware that there is any further documentary evidence to which it is necessary to refer. I now come to the affidavits, and I shall examine them, not with reference to the sale by Jameson, for of that part of the case I have disposed, but with respect to Stiles and his conduct, and whether credit is to be given to him or Richards. Mr. Richards deposes, 1. That he did not give the power of attorney to Stiles as a security for any advances, but that he did so as a measure of expediency, or in case of an advantageous offer for the ship.

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2. That a purchase by Stiles of one-eighth was agreed upon and instructions sent to Tarrant to make it over. 3. That Stiles had instructions not to sell for less than 10,000*l.* to 13,000*l.* 4. The order for insurance to that amount. I will now look at the other affidavits, and see how they confirm or contradict Richards or Stiles. Affidavit of Mr. Grosvenor, who repaired the ship at Whampoa, when under Stiles's command :—" Stiles never expressed to me any doubt of the validity or legality of the sale of the ship at Shanghai; he did mention that he might have had a share, but afterwards said he would not do so because, according to the statement of Richards, she had cost so much." Tarrant's affidavit :—" I had authority from Richards to transfer one-eighth to Stiles; Stiles objected to the price. He never suggested that the sale at Shanghai was illegal, or that Richards could not give a good title." Against this evidence there are two affidavits made by Stiles; some of the facts, I must say, are very remote from the true issue in the cause; but I will notice them. His statements are in opposition to the evidence I have just quoted, and I have to weigh the credit to be ascribed to one or the other. Stiles denies, first, that he declined to take the eighth share in consequence of the price. He says, " Richards proposed to me to take the eighth, and I tacitly agreed so to do in the event of Richards being intitled to give me a good title." This is rather an extraordinary statement, for many reasons: Captain Stiles having been at Shanghai, having also been in a similar predicament, namely, having sold the ship he commanded, and there being but three hundred Europeans in the place, and being appointed to the command of this vessel, must have known what title could be given! How a tacit assent accords with this condition is also somewhat strange. How the surveys exhibited in this cause altered his opinion I do not know, for not a single fact is disclosed by them he did not know before. As to the mortgage he admits, from the letter of Richards, that he knew it had been paid off. So far as this case can depend on the comparative degree of credit to be given to Mr. Richards or Captain Stiles, I have no hesitation in declaring my opinion to be in favour of Mr. Richards; he is confirmed by the documentary evidence in the cause and by other witnesses, and Stiles is corroborated by none; but also because Stiles has sworn to statements wholly inconsistent with his own conduct, and to other facts where his testimony is disproved. Stiles has sworn he believes that the sale by Jameson was illegal and fraudulent, that the surveys and estimates were excessive and fraudulent; yet this man, being on the spot, with ample means of knowing all the facts, and he must have known them, not only becomes master,

but agrees to take a share in the vessel ; and, above all, proceeds to sell that vessel under a power of attorney from a person who, according to his own oath, had no title at all ! I have said enough to dispose of the credit of Captain Stiles. After these observations it is almost superfluous to inquire whether Stiles was justified in selling the vessel at all, for how could he be justified in selling what he has sworn to be the property of Mitchell ?

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Before I address myself to the question whether, under the circumstances, Captain Stiles was justified, as between him and Richards, in acting under the power when he did, and as he did, I will say a word as to a question of law which was suggested by Dr. Phillimore ; but, I am inclined to think, left almost derelict on all sides. That question of law was as follows :—That the decree of insolvency by the Consular Court at Shanghai was legal ; that this declaration took place on the 13th of May, 1856 ; that thereby all the moveable property of the insolvent, wheresoever, vested in the assignees. I strongly incline to the opinion that this proposition is true by the principles of international law, though our cases on the subject are so incumbered by reference to Acts of Parliament, that I could not venture to say that I have found any authority precisely applicable to this case ; but assuming that the proposition suggested by Dr. Phillimore is founded in law, it does not dispose of this case. The effect of such vesting in the assignees, assuming it to have taken place, must be considered. The proposition, to affect the determination of this case, must go to the length of contending that a *bonâ fide* use of the power of attorney after the decree of insolvency and before that decree could be known, would be null and void. I know of no case to that effect, and none has been cited. I am aware that there are strong cases of the revocation of a power of attorney by death, but I know of none with respect to bankruptcy or insolvency except the case of *Dixon v. Ewart*(a), and there the exercise of the power was substantially completed before the bankruptcy. If it were necessary for me to decide this question, I presume that, Richards being domiciled at Shanghai, I must decide according to the principles of international law ; and I should be sorry to think that those principles compelled me to annul *bonâ fide* transactions by reason of a contingency which the contracting parties were wholly ignorant of, and had no reason to expect : it is manifest that to adopt such a rule might work great injustice. In the present case, however, the question might become still more complicated, for

Quære. Was the power of attorney revoked by the decree of the grantor's insolvency at Shanghai ?

(a) 3 Merivale, 333.

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it might possibly be contended that this was not a simple power of attorney but a power coupled with an interest, namely, to secure monies due to the grantee of the power; and, therefore, it might be said it was irrevocable. I am of opinion, however, that such a position could not be adopted in the present case; for in support of it I have but the affidavit of Captain Stiles, to which, uncorroborated, I can give little credit. The document, on the face of it, gives no such intimation; there is no proof of any monies advanced before the power was executed, and the statement is directly contradicted by Richards. It is certainly not my intention to decide this case upon such nice questions of law as those I have adverted to, unless, indeed, I should find myself compelled, by stern necessity, so to do.

Stiles was not justified in selling;

even if he held the power as a security for his own advances,

because he was acting against the instructions of his principal, which amounted to a substantial revocation of the power.

The question which I am now about to discuss is the following:—Was Captain Stiles justified, under the circumstances, in selling this ship as he did under the power of attorney he held? First, I am of opinion, as already stated, that Captain Stiles has not proved the averment that this power of attorney was granted to him as a security; and even if it were, I greatly doubt if that fact could authorize a sale. Take the case of a factor, who has made advances and has a lien; he cannot sell contrary to orders. That was decided, after ample discussion, by the Court of Common Pleas, in *Smart v. Sandars* (a). Next, it is abundantly clear, that, though the power of attorney was not formally revoked, yet that Captain Stiles, long before the sale, received letters informing him that he was to be dismissed, and of the owner's intention to dispose of the ship; the whole contents of those letters show that the owner did not desire that Stiles should sell this ship under this power of attorney, and Captain Stiles's letter shows that he was about to sell the ship not in accordance with the wishes and directions of the owner, but in despite of them. I apprehend that, as a general rule, the grantee of a power of attorney is bound to follow the directions and wishes of the grantor; as, for instance, with respect to a power of attorney to sell stock, the grantee must exercise that power according to the orders of the grantor. I conceive, that to use a power of attorney contrary to the known wishes and directions of the grantor, is a breach of trust. It must be admitted, however, that Captain Stiles was placed in a state of considerable difficulty by the refusal of Mr. Lea to take the agency of this ship; it seems clear that Stiles had advanced money and incurred responsibilities on account of the ship, though how the accounts

stood or what became of the freight homewards I am wholly ignorant: still Richards's letters show there were some monies due to Stiles. In case of absolute necessity Stiles might be justified in selling the ship—I do not say in this sale; as supposing his owner had remained at Shanghai. But his owner was at New York and coming to England, and this Stiles well knew, for he wrote to New York, and that letter shows his determination to sell despite the owner. I am of opinion, that though the power of attorney was not expressly revoked, yet that it was substantially; that the circumstances of the case were not so urgent as to authorize the master to sell as he did, and that he was not justified in the course he pursued.

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But however this may be as to Stiles, it is manifest that Messrs. Morice and Towne could not be affected by Stiles's conduct towards his owner, save so far as they had actual knowledge of the fact or knowledge in contemplation of law, and that a *bona fide* transaction with the holder of a power of attorney must bind the principal, even though the attorney may be to blame, provided, of course, that the transaction be within the limits of the power. Let me, therefore, now consider how Messrs. Morice and Towne stand with reference to the sale, and the circumstances attendant on the sale. It has been pleaded, on behalf of Messrs. Morice and Towne, that Richards is not, and never was, the lawful owner of this ship; and it has been sworn in an affidavit brought in on their behalf, that the sale to Richards was illegal and fraudulent. I have cited these passages before, but I cite them now with a view to this inquiry:—When was it that Messrs. Morice and Towne discovered that the sale to Richards was illegal and fraudulent, and that Richards never was the owner of this vessel? Was it before the purchase? In that case they were buying the ship of the attorney, of a man whom they knew not only to have no legal title, but to be in possession under a fraudulent sale; it would be difficult to say that such a purchase as that could stand good. But did Messrs. Morice and Towne make the purchase first and afterwards discover that Richards's title was founded upon an illegal and fraudulent sale? if so, how and when? I will examine how this matter stands. Captain Stiles had formerly commanded a ship in which they had an interest, which ship was sold somehow, it matters not how, in China; Messrs. Morice and Towne had insured the Margaret Mitchell by the direction of Stiles; they were, therefore, previously acquainted with Stiles himself, and were not altogether strangers to the concerns of the vessel. Then, in 1856, they purchased the Margaret Mitchell, as they say, under the follow-

All the circumstances show that the defendants were cognisant of the fraud of Stiles, or that they did not make reasonable inquiry.

Evidence on this point considered.

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ing circumstances.—On the 2nd of June Stiles placed the ship in the hands of Messrs. Rayden and Reid for sale, and it was advertised for sale by public auction on the 11th of June. Mr. Morice swears that the attention of his partner and himself being drawn to the notice of sale (how, whether by the notices themselves or through Stiles he does not say), they made inquiries of Rayden and Reid and of Stiles as to the title Stiles could legally convey to a purchaser. Now what was the result of that inquiry? Mr. Morice does not tell us. Did Captain Stiles give Mr. Morice the history of Richards's title, such as he has now sworn to, or did he induce, by another representation, Mr. Morice to buy? I must, in favor of Mr. Morice, presume the latter; but then what becomes of Captain Stiles's honesty and integrity? Mr. Morice further says that he ascertained that Mr. Mitchell was the registered owner; that there was an indorsement on the certificate of register of the sale at Shanghai, and also of a mortgage for 1,336*l.* to Messrs. Anthon & Co., of Hong Kong; that he applied to the comptroller of the Customs, who informed him no register could be granted without consent of Mitchell, and that accordingly he gave up the intention to purchase. The next step in this transaction is, that on the 11th of June the ship was arrested on the instance of Mr. Mitchell, and the sale by auction thereby prevented; and now comes a passage in the affidavit which deserves great attention. Mr. Morice swears that he "was waited upon by Mr. Stiles, who represented that he had not means to defend the action, and expressed great doubts whether he could successfully contest the right of Mitchell to the possession of the ship, which had been, as he said, most unjustifiably sold to Richards." Here I pause, and I should like to know what the answer of Mr. Morice was to such representation. Did he not know that if the vessel had been most unjustifiably sold to Richards, that Richards had no right to execute any power of attorney to sell her, and that the proposal by Stiles, as attorney to Richards, with such a conviction, was contrary to every principle of justice? I proceed to the next passage in this affidavit. "Stiles requested him, Morice, to negotiate for the sale of Mitchell's interest in the ship; that he accordingly did negotiate with Mitchell, and arranged that Mitchell should transfer the ship to him and his partner for 1,200*l.*" Now, I must ask, by whose authority Messrs. Morice and Towne undertook such negotiation, and what, in effect, the transaction of such negotiation was? The 1,200*l.* paid to Mitchell was 1,200*l.* out of the pocket of Richards, if he was *bonâ fide* the owner; and who did or could authorize Messrs. Morice and Towne so to deal with the interests of Mr. Richards? From Richards himself they had no

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authority, from Stiles they could have none, for he had simply a power of attorney to sell the ship; and a power of attorney to sell the ship imports that he shall sell the ship for its value as a ship, and gives no authority to negotiate a sale upon any other terms. Of this 1,200*l.*, if Richards had a *bonâ fide* title and this sale could stand good, he would be defrauded by this arrangement; and if Richards had no valid title he would not have any right in law or in equity to the other sums said to have been paid on account of this purchase by Messrs. Morice and Towne to Stiles and Lea as his agents. Now here let me observe, that if ever there was a case in which the vigilance of a purchaser ought to have been awakened, it was the present. It must have been perfectly evident to Messrs. Morice and Towne that this was a sale not for the benefit of the owner, but for the benefit of Stiles the master; it was their bounden duty, as honest purchasers, to make every possible inquiry as to the circumstances which induced the sale, and as to the directions given by the owner of the vessel: it was not a common sale by power of attorney, it was a sale by a master under a power of attorney, invalid by his own representation, and rendered still more suspicious by the claim of Mr. Mitchell. This is not the case of a *bonâ fide* purchase under a power of attorney, where the purchaser afterwards, discovering that he has got a doubtful title, seeks peace by a payment to an adverse claimant; but it is the case of a purchaser being told beforehand that the attorney has no right to sell, bolstering up his title by reference to a third party at the expense of an individual whose interests were, without authority, sacrificed. I proceed to the next step. Mr. Morice swears, that on June 13th the ship was transferred to him by Stiles free from incumbrances, save as appears by the registry of the ship, whereby Mitchell appeared to be the registered owner, and subject to a mortgage of 1,336*l.* Now Stiles knew that that money on mortgage had been paid off; did he or did he not communicate that fact to Messrs. Morice and Towne? If he did, why was no notice taken of that communication? if he did not, where is his honesty? But what is the effect of this bill of sale? Why, that there being a reservation of this incumbrance, and the incumbrance not existing, it was so much money deducted from the real price and value of the vessel. The next step is a bill of sale taken from Mr. Mitchell, in consideration of 1,200*l.*, with a covenant that Mr. Mitchell has power to transfer, and that the ship is free from incumbrances. Now what is the result of this transaction? Is it meant, that if Mr. Mitchell's title could be sustained the claim for the mortgage would be invalidated, or what is the meaning of this averment in the bill of sale? It is

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right to observe, also, that these transfers take place by private contract, and not at a public auction. Now let me look to the price which has been paid for this vessel on account of Mr. Richards,—4,000*l.* and no more, that is the utmost extent to which he could be benefited by this transfer; possibly, if the 1,336*l.* mortgage were added to the price, Messrs. Morice and Towne might conceive that they had given more, but they knew, or ought to have known, that that mortgage was paid off. Now, was this price the true value of the property transferred, and how is that value to be ascertained? On the part of the purchasers thus:—"We bought a doubtful title." Be it so. Who gave Stiles a power to sell the ship upon a doubtful title? and by what authority from Richards did they take a doubtful title? On the part of Richards it is contended that the value of the ship was what it was worth with a good title; and beyond all doubt and question, both from the affidavit of Mr. Bayley, the repairs done and the insurances effected, the real value of the ship was above double 4,000*l.* Lastly, what became of the price? About 3,000*l.* was paid to Stiles, who retained it in liquidation of an account consisting of his own demands only, never settled by his owner; the remainder was paid to Mr. Lea, who, though he repudiated the agency of the ship, was not unwilling to take as such agent the residue of the purchase-money on an equally unsettled account.

Recapitulation: the sale by the master valid, the subsequent sale by Stiles invalid. Judgment for the plaintiffs.

I have now finished my investigation into this transaction, with an earnest endeavour to ascertain its real nature, and I cannot doubt the conclusions to which I must come. I am of opinion, as I have already expressed, that the sale by Jameson was fully authorized by the circumstances of the case, and that Mr. Mitchell's title was wholly divested thereby; and I am further of opinion that the claim of Messrs. Morice and Towne to rely upon the purchase from Stiles as the attorney of Richards cannot be supported; I think that the conduct of Stiles was not justifiable, and that the transaction was so conducted that, with reference to the facts already stated, upon every principle of law and equity, the sale was void.

Bowdler and Buthurst, proctors for the Plaintiffs.

Clarkson for the Defendants.



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December 3.

THE VIANNA.

*Collision—Ship launching—Reasonable Notice—Onus probandi
—Look-out—Both Vessels to blame.*

A river being a public thoroughfare, must, as a rule, be kept open and free from danger, for all ships navigating thereon.

On the occasion of a ship's launch, those in charge of the launch are bound to give the customary notice; if there is no custom, then reasonable notice.

Reasonable notice, in such circumstances, considered.

The *Blenheim* (a) followed.

The party launching must prove that such notice was given.

Vessels navigating the river are bound to observe reasonable signals of an intended launch.

COLLISION. The *Rosendale* was proceeding down the river Tyne in tow of a steam-tug, and had reached a narrow part of the river called the Narrows, when the *Vianna*, a large screw-steamer, was launched from Marshall's ship-yard, and came on stern foremost into her starboard quarter. The wind was setting up the river, the tide was nearly high water.

The libel of the *Rosendale* pleaded that the collision was caused by the want of proper care and precaution of those in charge of the *Vianna*. The allegation of the *Vianna* pleaded that the signals of a launch, according to the custom of the Tyne, are—

1st. That a flag should be hoisted forward, and an ensign aft, on board the launch, for some time before high water (the time of the intended launch), in order to show that it is about to take place.

2ndly. That half an hour, or thereabout, before the launch takes place, the ensign should be lowered, but the flag forward kept flying, for the purpose of showing that the time of the launch is approaching.

3rdly. That when the launch is on the point of taking place,

(a) 4 N. of C. 493.

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the ensign is to be again hoisted, to show that all is ready, and that the vessel will be launched immediately. It then alleged that each of these operations had been duly and properly observed, and that the collision was caused by the negligence of those on board the *Rossendale* in not noticing the signals, or by rashly proceeding in defiance of them. The responsive allegation denied the custom to be as pleaded, alleging a different custom, and pleaded that it was also customary to procure the attendance of the harbour-master to keep the river clear. This was traversed by the *Vianna*.

In the evidence it appeared that those in charge of the *Rossendale* had not observed the signals on board the *Vianna*, and were not aware of the launch until the last moment; that the custom of using any particular series of flags as signals was not uniform; and that there was no invariable custom of summoning the harbour-master. It also appeared that those in charge of the launch of the *Vianna* had not observed the *Rossendale*, until the launch was actually taking place, and it was impossible to stop it.

The *Admiralty Advocate* and *Deane*, Q.C., for the *Rossendale*.

Twiss, Q.C., and *Waddilove*, for the *Vianna*.

The case of the *Blenheim* (a) was cited, and commented upon.

DR. LUSHINGTON, summing up to the Elder Brethren.

The party launching is bound to prove that he gave customary or reasonable notice.

I adhere to the principles I laid down in the *Blenheim*. As a general rule the thoroughfare of the river must be kept open, and free from danger for all ships passing to and fro. If a ship is to be launched, causing thereby the temporary hindrance of a common right, the party launching must give adequate notice; and the *onus probandi* that proper notice was given is upon him. As to what is adequate notice, if one custom is universally observed, it is sufficient to show that that custom was followed, because, even supposing that the custom did not prescribe all that might be desired, no one is bound to do more than the custom of the place requires. If there is no fixed custom, reasonable notice must be given, notice of a reasonable kind, and in a reasonable time.

In the present instance no custom is proved, because a custom in law must be universal, or at least so universal that any departure from it is recognized as unusual and extraordinary. Here there is no fixed universal custom; no fixed custom as to sending for the harbour-master; no fixed custom as to the kind of flags to be used, and the manner in which they are to be exhibited. We must therefore consider what is the reasonable notice which the law in the circumstances of the case requires. Mr. Marshall's yard is situated at the Narrows. The river is so narrow there that it is obvious that the launch of a great ship could not take place there without danger to ships passing; it was therefore incumbent upon the parties engaged in launching to exercise the greater caution; to give to all ships navigating the river clear intelligible notice, and in reasonable time, that a launch was about to take place. It seems reasonable, and is admitted, that, although there is no custom as to the precise signals to be used, the notice by flags on board the launch should be of two kinds; one a general notice that the launch is going to take place, the other, which is much more important, that the launch is going to take place immediately, because no one can for a moment contend that the navigation of a river is to be stopped during a whole day on account of the launch of a ship. You will probably be of opinion that this general notice by flags of the intended launch was given, so as to be observed and understood by all vessels navigating the river with proper caution and a sufficient look-out. As to the particular and final notice, you will perhaps be in more doubt, because it appears that the vessel was almost in motion before the last flag was hoisted. But you will also have to consider whether, in the circumstances, those in charge of the launch ought not to have obtained the assistance of the harbour-master to keep the way clear, or at least whether they ought not to have had boats in attendance to give timely warning to vessels; neither of which precautionary measures was adopted. You will also consider whether, before giving the final order for launching, it ought not to have been ascertained that no ship was passing, so as to be endangered by the launch. I now come to those on board the *Rossendale*. It appears, according to the evidence of the master, pilot, and second mate, that they went down the river and never saw signals of the launch at all. Assuming that to be true, it seems to me a very great question whether they must not have neglected to use common and ordinary caution.

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What was reasonable notice?

Did the *Rossendale* keep a proper look-out?

On returning from consultation with the Elder Brethren.

1858. **DR. LUSHINGTON** :—We are all of opinion that both ships are
December 3. to blame for this collision. Those who conducted the launch
 Both vessels to are to blame for not having taken reasonable and proper pre-
 blame. cautions to have the way clear before launching. Those on
 board the *Rossendale* are to blame in not keeping a sufficient
 look-out and taking proper measures thereupon.

Stokes, proctor for the *Rossendale*.

Waddilove for the *Vianna*.

THE VICTORIA, PEARSON, *Master*.

*Possession—Legal and Equitable Title—Jurisdiction—3 & 4
 Vict. c. 65, s. 4.*

The Merchant Shipping Act, 1854, admits equitable interests in ships. The Court will not dispossess the equitable owner of the moiety of a ship at the instance of the legal owner of more than a moiety.

Semble. The Court has no original jurisdiction over equitable title, and will not therefore dispossess the legal owner of a moiety at the instance of the equitable owner of more than a moiety.

The Court inclines against dispossession, and requires the plaintiff's claim to be clearly proved.

P., the master of a ship in possession, was registered owner of twenty-eight shares only; R. was the registered owner of the remaining thirty-two: but it was proved, to the satisfaction of the Court, that R. held four of his shares as trustee for P. *Held*, that P. was intitled to retain possession.

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THIS was an action of possession brought by Richard Redway, as the registered owner of thirty-six shares of the brig *Victoria*, against Thomas Pearson, the master, who was in possession. Pearson alleged himself to be the registered owner of twenty-eight shares, and the equitable owner of four more. The questions for the decision of the Court were,—1. Was Pearson in fact the equitable owner of the four shares? 2. If so, was he intitled to retain possession of the ship?

Addams, Q.C., for Redway, the Plaintiff.

Twiss, Q.C., for Pearson, the Defendant.

Judgment.

DR. LUSHINGTON :—At the commencement of this suit Tho-

mas Pearson, the master, was in possession of this vessel. Richard Redway, alleging himself to be the owner of thirty-six shares, instituted the present proceeding, in order to eject the master (who is admitted to be the owner of twenty-eight shares), and to have the vessel delivered over to him.

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The matter of fact in dispute is whether Redway is the *bond fide* owner of thirty-six shares, or whether, as to four shares, he is not trustee for the master.

Pearson's case is, that he agreed with Redway to purchase the vessel of Swain, the former owner, each purchaser to have a moiety; and as he was to be the master, in order that he might not have the control of the vessel, it was further agreed that he, Pearson, should be registered for twenty-eight shares only. As to the probability of such an arrangement I say nothing, for I can really form no opinion whether it is likely that persons in such situations should form such a contract; but when I look to evidence of such agreement, I certainly should have expected that it should be put into writing. It is not alleged that this was done.

Defendant's
case.

With respect to the payment, Pearson states that the price of the moiety would be 246*l.*; that he had but 150*l.*, and that Redway advanced him on loan the 96*l.* to make up his share of the price; that from the purchase all the accounts were made out on the footing of the parties being intitled in moieties, and that he was charged with interest for the 96*l.* The accounts certainly do show *primâ facie* that such was the case.

Mr. Redway, on the other hand, denies that there was any such agreement as stated by Pearson. He says that he purchased thirty-six shares, and that Pearson bought twenty-eight only, and that he advanced Pearson 61*l.* to make up the price of those twenty-eight shares, the price being 211*l.*, and Pearson producing only 150*l.* He admits that they were to share the profits in moieties, and to bear the expenses and losses in the same way. He admits also, that he debited Pearson with 96*l.*, which, added to Pearson's 150*l.*, would be the price of a moiety; but he says the 96*l.* in the item account, consisted of the 61*l.* advanced to Redway, and 35*l.* the price of the four shares he had himself paid to the former owner. I can understand that if Redway allowed Pearson to share in moieties, he might justly charge him with the interest on the four shares, but

Plaintiff's case.

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I do not understand how he would charge him with the principal, and yet he appears so to have done.

I am wholly dissatisfied with Redway's explanation of this part of the transaction. The bills of sale and the register agree with the case of either, though standing alone they would be conclusive in favour of Redway; they both make Redway the owner of thirty-six shares, and Pearson the owner of twenty-eight only. Mr. Swain is unfortunately dead. It is upon this conflicting evidence I have to decide, and I have come to the conclusion that, in point of fact, Pearson is the equitable owner of these four shares. The question of law then comes, whether he is therefore intitled to hold possession of the ship as against the legal owner of more than a moiety.

History of the Court's jurisdiction in causes of possession.

It is important to consider on what foundation the jurisdiction of the Court stands, and within what limits it is circumscribed. Causes of possession always belonged to the Court of Admiralty, but such jurisdiction was very limited; if questions of title arose, the Court declined to proceed further. It pleased the legislature, however, to enlarge the jurisdiction by enabling the Court in causes of possession to try questions of title (a). I have no doubt, therefore, of my authority to try questions of legal title, but how far I should be justified in trying an equitable title, is another question. It was said by Lord Stowell that the Court exercised an equitable jurisdiction, and in one sense of the term I do not doubt it; but how far is the Court competent to enforce rights of technical equity, such as trusts? I need not give a complete answer to this question, for I apprehend that there is a distinction between enforcing an equitable right at the instance of the party claiming such right, and refusing to enforce a claim of a legal owner to the disregard of an equitable right.

Limits of its jurisdiction over equitable titles.

The plaintiff's title to possession is not sufficiently proved.

I am of opinion that Mr. Redway, who has promoted this suit, has not proved, to the satisfaction of the Court, that he has such a title to this ship as intitles him to the aid of this Court to take the possession out of the hands of the master. I think I ought not to comply with such prayer, unless the case is perfectly clear.

Judgment for the defendant.

Clarkson, proctor for the plaintiff.

Toller for the defendant.

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February 22.

THE SEINE, — BALLISTON, *Master*.

Collision—Steamer—Starboard side of Mid-Channel—"Wilful default" of Master—Pleading—17 & 18 Vict. c. 104, ss. 297, 299.

The owners of a steamship are responsible for damage caused by the act of the master in not observing the 297th section of the Merchant Shipping Act, 1854, which prescribes keeping to the starboard side of the mid-channel, notwithstanding the 299th section declares that the damage in such case shall be deemed to be caused by the wilful default of the person in charge of the deck.

The *Druid* (a) distinguished.

The 297th section is not to be controlled by any custom resting on mere convenience, even the convenience of public officers, as Custom-house officers, in the discharge of their duties.

The *Fyenoord* (b) followed.

Semble. A defence in law which might have been raised in the pleadings, and was not so raised, cannot be afterwards relied upon at the hearing.

THIS was an action of collision brought by the owners of the steam-tug *Victory* against the steamship *Seine*, and her owners the General Steam Navigation Company, intervening.

The *Victory* was lying at anchor in the Thames a little below Gravesend, and inside the line of coal-hulks on the south side of the river. About 7 A.M., on the 6th October, she got under weigh, and steamed out between two of the coal-hulks standing to the northward, in order to pass between two vessels lying outside the line of coal-hulks, and speak another steamer belonging to the same owners. The weather was fine and clear, the tide ebb. The tug was steaming about four knots an hour. On issuing between the coal-hulks the *Seine* was observed a mile off coming up the river on the north side; on approaching the opening between the two vessels the *Seine* was standing across the river, at about twelve knots an hour, under her starboard helm, in a direction for the tug's starboard side. The master of the tug, seeing a collision was imminent, put on at full speed in order to clear the bows of the *Seine* if possible; but the *Seine* came straight on, and, striking the tug on her starboard quarter, sank her immediately.

The allegation pleaded that the collision was caused by the *Victory* suddenly shooting out from between the coal-hulks and crossing the bows of the *Seine*; and that the *Seine*, although her

(a) 1 W. R. 391.

(b) Ante, p. 374.

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helm was ported and the engines reversed, could not avoid the collision. It also pleaded that the *Seine* was brought gradually over to the south side of the river "in order to her approaching as near as conveniently might be to the station off the Custom-house at Gravesend, appointed by the Lords Commissioners of her Majesty's Customs, as that for all steamers from foreign parts arriving in the port of Gravesend to take on board their Custom-house officers, pursuant to the provisions in that behalf of the 8 & 9 Vict. c. 86, such being also the well-known and recognized course of navigation for all steamers arriving in the said port of Gravesend from any foreign parts for that purpose, pursuant to the statute aforesaid."

The 12th section of 8 & 9 Vict. c. 86, enacts, "That every ship shall come as quickly up to the proper place of mooring or un-lading as the nature of the port will admit, and without touching at any other place; and in proceeding to such place, shall bring to at stations appointed by the Commissioners of Her Majesty's Customs for the boarding of ships by the officers of the Customs."

It appeared in evidence that many steamers and other vessels cleared on the south side of the river, and an officer from the Customs' department deposed that in rough weather it was dangerous to cross the river in boats.

Deane, Q.C., and *Wambey* for the *Victory*. The *Seine* was on her wrong side of the river. The convenience of Custom-house officers cannot override an Act of Parliament.

Addams, Q.C., and *Robinson* for the *Seine*. The *Seine* was not "navigating" within the meaning of section 297 of the Merchant Shipping Act. The custom and necessity for the custom are sufficiently proved. But even if the *Seine* was violating section 297 in being on the south side of the river the owners are not responsible, because section 299 declares that the violation of the statute shall be considered the "wilful default" of the officer in charge, and owners are not liable for the wilful act or default of their servants; *Druid* (a).

Deane, Q.C., in reply.

DR. LUSHINGTON, to the Elder Brethren.

I think the Court has some reason to complain of the conduct of one of the parties in raising a point of law that is not stated

in the pleadings. Dr. Addams has contended, that assuming the crossing over to the south side of the river was a violation of the 297th section of the Merchant Shipping Act, the owners of the Seine are not liable, because the 299th section declares that "in case any damage to person or property arises from the non-observance by any ship of any of the said rules, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck." Certainly this is a proposition of transcendent importance, because, if the argument be right, this Court has been wrong a hundred times, and so have their Lordships in the Privy Council; and not only wrong with regard to ships keeping the starboard side of mid-channel, but wrong with regard to the exhibition of lights, and wrong with respect to the rule of port helm given in the 296th section. It would be unfortunate, indeed, if we had all been in error from the time this statute was passed up to the present period. But this objection in law is not raised in the pleadings. The owners of the Seine have not repudiated the act of the master, they justify it. In the case of the *Druid* I was obliged, though very reluctantly, to come to the conclusion that the owners of a steamer were not liable for the act of their master in wilfully running into another vessel; but that was an act of a very different complexion from this, for the master was not acting within the scope of his ordinary duty, and the act was altogether illegal and with an illegal intention; and there the owners repudiated the act. The rule of law is, as stated in the earlier cases, "that for the careless performance of a legal act the master of the servant is responsible;" here the master of the Seine was navigating the steamer within the sphere of his ordinary and lawful business. I have, therefore, no hesitation in overruling the objection; 1st, because it is not raised in the plea; 2ndly, because it is contradicted by the practice of this Court and the Privy Council; 3rdly, because it is not, in my judgment, in itself well founded.

The counsel for the Seine, however, seek to justify the crossing over to the south side of the river; 1st, by the custom of steamers from foreign parts clearing to the southward; and, 2ndly, by the alleged danger to the Customs' officers in crossing the river to the northward. The custom, even if it could be entertained as any valid justification, is, in my opinion, not proved; it is not proved to be uniform, and is, therefore, no custom in law. Next, is there any pretence for saying that the Seine was prevented from obeying the Act of Parliament by any danger that the Customs-house officers would have incurred? For we must look to the Act of Parliament. The Act says, "Every steamship, when

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Objection that navigating the wrong side of the river was a wilful default of the master, for which the owners were not liable, overruled. 1. Because not pleaded. 2. Because contrary to the universal practice of the Court and the Privy Council. 3. Because not well founded. The *Druid*, 1 W.R. 391, distinguished.

Justification by custom not proved.

The custom itself not valid, there being no danger to warrant departure from the statute;

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and the convenience of Custom-house officers not being sufficient ground to support it.

navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steamship." The question, therefore, is, Was it not safe and practicable for the steamer to have kept to the north side of the river? If it had been shown that crossing the river in boats was generally dangerous, say ninety-nine times out of a hundred, there might be some force in the argument, though even then the dangers arising from a departure from the rule of navigation would have to be considered on the other side; but, in fact, it is only dangerous to cross the river on a few stormy days, and this was a fine morning. With the mere convenience of the Custom-house officers we have nothing to do. This has been already decided by the Privy Council in the case of the *Fyenoord* (a), where their Lordships also held, that, although a foreign steamer might not be bound by the rule of the statute, a custom of navigation must be considered to have emanated from the statute which the foreign vessel was bound to obey.

Turning to the case of the *Victory*, the only questions are, whether she kept a due look-out, whether she was justified in holding on when she observed the *Seine*, and whether she took the proper measures to avoid the collision.

Seine alone to blame.

DR. LUSHINGTON, on returning from consultation with the Elder Brethren:—We are all of opinion that the entire blame of this collision rests with the *Seine*.

Deacon, proctor for the *Victory*.

Toller for the *Seine*.

(a) *Ante*, p. 374.

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THE GLENTANNER.

Master's Wages—Mortgagee—Counter Claim—Judgment Debt on Dishonoured Bill—17 & 18 Vict. c. 104, s. 191.

In an action of master's wages, a mortgagee intervening and declaring to setup a right of set-off or counter-claim, but not filing any such counter-claim in the Registry, but only a statement that he "objected to all the claims in the master's account, except those relating to the payment of wages, and the wages claimed," must submit to a settlement of all the accounts between the master and the ship, exclusive of any private account between the master and the owner in respect of extraneous matters.

In this settlement the amount of a bill drawn by the master on the owners for the ship, and dishonoured by them, for which judgment has been recovered against the master, but execution not levied, is to be taken into account.

THIS was an act on petition in objection to a report of the Registrar and merchants. The question at issue was the interpretation of the 191st section of the Merchant Shipping Act, 1854.

The action was brought by the master of the English ship Glentanner for his wages, against the ship and freight. An appearance was given by Messrs. Vaughan and Schofield, the mortgagees of the ship in possession, and they declared to set up a right of set-off or counter-claim. The master was thereupon assigned to bring in his accounts and vouchers, and the case was referred to the Registrar and merchants. The Registrar and merchants reported as follows :—

"To the Right Honorable Stephen Lushington, &c.

Whereas on the 18th day of September, 1858, the proctor for and on behalf of the said Messrs. Vaughan and Schofield having declared that his parties would set up a right of set-off or counter-claim to the wages proceeded for in this cause, the Worshipful Samuel Jewkes Wambey, Doctor of Laws, one of your surrogates, was pleased to refer the claim of Benjamin Bruce (F. Clarkson's party), together with all accounts and vouchers brought in or thereafter to be brought in relative thereto, to your Registrar, assisted by merchants, to report the amount thereof: and whereas the proctor of the said Benjamin Bruce subsequently brought in his accounts and vouchers, and the proctor for the said Messrs. Vaughan and Schofield alleged that he objected to the claim and account-current brought in, as containing accounts which have not arisen, and are not outstanding or unsettled, between the parties to the proceeding, and prayed to be heard on his petition in objection thereto; and you were pleased to reject

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such prayer and to direct the reference to be proceeded with: and whereas the proctor of the said Messrs. Vaughan and Schofield subsequently alleged that he objected to 'all the items in the master's claim, save and except those relating to the payment of wages as enumerated in the portage bill, and the wages claimed by the said Benjamin Bruce as master:'

Now I do most humbly report that having with the assistance of Messrs. John Cattley and Robert Embleton, of London, merchants, taken the said claim and objections into consideration, as also all accounts and vouchers and the papers and proceedings produced and brought in, together with what was urged by the parties, their proctors and agents on both sides, I am of opinion, for the reasons stated in the Exhibit hereto annexed marked No. 1, that there is due to the said Benjamin Bruce, on the accounts arising or outstanding and unsettled between the parties to the proceeding, the sum of 793*l.* 0*s.* 6*d.*, together with interest thereon at the rate of four per cent. per annum, as set forth in the Exhibit hereunto annexed marked No. 2.

(Signed) H. C. ROTHERY,
Registrar.

Admiralty Registry, Doctors' Commons,
16th December, 1858.

EXHIBIT No. 1.—REASONS FOR THE REPORT.

This was a suit instituted by Benjamin Bruce, the late master of the *Glentanner*, to recover the wages due to him for his services on board that vessel.

It appears that on the 10th of April, 1854, whilst the ship lay at Melbourne, he was engaged by the agent of Messrs. Hyde, Hodge and Company, the owners, to take charge of her as master, and that he served in her in that capacity from that time to the 11th of September last.

In 1855 he effected a settlement of accounts with his owners to May in that year; and in June, 1857, he obtained a further settlement of accounts with them. On the 10th of that month she left London with passengers and cargo for New Zealand, and having taken in a cargo of wool, arrived in the London Docks on the 1st day of August last (1858). In the meantime Messrs. Hyde, Hodge and Company had, on the 5th of December, 1857, mortgaged the *Glentanner* to Messrs. Vaughan and Schofield,

the parties in this suit, as a security for the repayment of the balance of an account then subsisting between them. This mortgage deed was not registered until the 3rd of August, 1858, after the return of the vessel to this country, nor did the mortgagees, as Mr. Schofield expresses it in his affidavit, 'take possession of her in their character of owners until the 7th of the said month of August, nor have they exercised any other right of ownership over the vessel beyond discharging the said Benjamin Bruce as master, and paying the balance due on the portage bill.'

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The master, being unable to obtain payment of his wages, caused the ship to be arrested by warrant, issued from this Court on the 11th of September last. To this action an appearance was, on the 16th of the same month, given on behalf of Messrs. Vaughan and Schofield, as the owners of the ship, but who, it is now admitted, are only the mortgagees in possession; and bail having been given, the ship was immediately released. On the 18th of the same month, two days afterwards, Mr. Rothery, proctor for Messrs. Vaughan and Schofield, declared that he would set up a right of set-off or counter-claim, and the master was thereupon assigned to bring in his accounts and vouchers, which were referred, as usual, to the Registrar and merchants.

On the accounts being filed, it appeared that the master had credited himself with a sum of 400*l.* 7*s.* 5*d.*, the amount of a bill which had been drawn by him upon the owners, whilst the Glentanner lay at Lyttleton, but dishonoured by them, and upon which he had accordingly been sued. It was not denied that the money had been required for ship's disbursements; but Mr. Rothery, on behalf of Messrs. Vaughan and Schofield, the mortgagees, objected, in acts of Court, to the claim and account current so brought in, as not containing the accounts 'arising, outstanding or unsettled between the parties to the proceedings,' that is, between themselves and the master, and requested the Judge's opinion upon this preliminary point. The Judge, however, refused to entertain the matter at this stage, and directed the reference to be proceeded with. Mr. Rothery has not filed any counter-claim or set-off properly so called, but has brought in a statement to the effect that he objected to 'all the items in the master's account, save and except those relating to the payment of wages, as enumerated in the portage bill, and the wages claimed by him, Benjamin Bruce, as the master of the Glentanner.'

The case then came before the Registrar and merchants, and the whole question turned upon the construction of the 191st

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section of the Merchant Shipping Act. The words of the section are as follow :—‘ Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages, which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if in any proceeding, in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due.’

At the hearing before the Registrar and merchants, it was contended by Mr. Rothery, on behalf of Messrs. Vaughan and Schofield, that the ‘ parties to the proceedings’ are not the owners and the master but the mortgagees and the master; they admit their liability to pay the wages, whether of the seamen or of the master, as being a lien upon the ship; but they say that, as mortgagees only, they have nothing whatever to do with any accounts between the master and his owners, which are not a lien upon the ship, and are not in fact ‘ accounts arising, outstanding or unsettled between the parties to the proceeding.’

That Messrs. Vaughan and Schofield could not have been held responsible for any claim beyond the wages which the master might have had against his owners, had they not set up a right of set-off or counter-claim, cannot, I apprehend, admit of a doubt; they might have said to the master, ‘ We will pay you the wages to which you may prove to be intitled, but we will have nothing to do with the accounts between you and your owners.’ But the question which we have to determine is, whether they can now do so; whether by claiming a right of set-off or counter-claim they have not placed themselves in the position of the owners as regards the master’s action, and whether the latter is not, under the circumstances, intitled to a settlement of all the ship’s accounts.

It may, perhaps, be proper to inquire, what it was that Messrs. Vaughan and Schofield sought when they claimed a right of set-off or counter-claim in the master’s action. They knew perfectly well that at that time they had not themselves made any payment to the master. Their object, then, could have been no other than to diminish the master’s claim by payments which it was supposed had been or might have been made to him by the owners. And suppose that it had transpired that the master’s

receipts during the voyage had far exceeded his disbursements, so that the balance actually due to him was less than the amount of his wages, could it have been contended by him, that the accounts of the receipts and disbursements not being between the 'parties to the proceeding' the mortgagees could not claim the balance as a set-off against his demand? Could the master have said, 'I admit that there is a balance due from me to my owners, but that has nothing to do with you, the owner is not a party to this proceeding; pay me, therefore, the full amount of my wages, even though there may be nothing due to me, though I hold in my hands a balance belonging to the owners more than sufficient to pay my claim?' I apprehend that he could do no such thing, and that the mortgagees would have a perfect right to claim, in deduction of the master's wages, any balance of receipts which he could be shown to have in hand on the owner's account.

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But if this would be the position of the master in such a case, how can the mortgagees now maintain the point for which they contend? They call upon the master for his accounts, and finding when they are produced that the balance due to him is greater than the amount of his wages, they now seek to withdraw their plea of a set-off or counter-claim and to limit the master's claim to the amount of his wages only. I am, however, of opinion that they cannot do so; they had the option, at first, either to pay the wages which might be shown to be due, or, having placed themselves in the position of the owners, to require an investigation of the whole of his accounts, and to pay him the balance which might appear to be due to him. Having elected the latter course, they cannot now say that the accounts are not accounts 'arising, outstanding and unsettled between them and the master.' And as no objection is taken to the accuracy of the accounts, either in respect of the wages or of the receipts or disbursements, I must report that the whole claim of the master should be allowed.

Although I entertain no doubts myself upon the point, still I consider the question to be one of so much importance that I shall be glad that the opinion of the Court should be taken upon it; and thus an authoritative interpretation given to this section of the Act, upon which so much discussion has already taken place before me.

(Signed) H. C. ROTHERY,
Registrar.

HIGH COURT OF ADMIRALTY.

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March 2.EXHIBIT No. 2.—SCHEDULE REFERRED TO IN THE ANNEXED
REPORT.

MASTER'S CLAIM.

	Claimed.			Allowed.		
	£	s.	d.	£	s.	d.
1. Wages from 1st June, 1857, to 1st August, 1858, 14 months at 10 <i>l.</i> per month	140	0	0	140	0	0
2. Finding cabin 14 months at 5 <i>l.</i> per month	70	0	0	70	0	0
3. 2½ per cent. on homeward freight 2,250 <i>l.</i>	56	5	0	56	5	0
4. 2½ per cent. on homeward freight 3,600 <i>l.</i> 7 <i>s.</i> 10 <i>d.</i> ...	90	0	0	90	0	0
5. Wages from 1st August, 1858, to 11th September, 1 month and 11 days at 10 <i>l.</i> per month	13	13	4	13	13	4
6. Draft on owner dishonoured	400	7	5	400	7	5
7. Balance due on account current	18	17	9	18	17	9
8. Costs on staying proceedings in action against the master by the holder of the dishonoured draft for 400 <i>l.</i> 7 <i>s.</i> 5 <i>d.</i>	3	17	0	3	17	0
	£793	0	6	£793	0	6

With interest thereon at the rate of 4 per cent. per annum, from the 12th day of September, 1858, until paid.

(Signed) H. C. ROTHERY,
Registrar."

The act on petition set out the facts, and alleged that the item of 400*l.* 7*s.* 5*d.* ought to have been rejected, as not arising out of, or having any relation to, any accounts outstanding and unsettled between the only parties to the proceeding, viz. the master and the mortgagees. The answer stated that the master had been sued upon the bill, and was liable to be taken into execution, and joined issue on the averment in the act on petition.

Addams, Q.C., in objection to the report.

The mortgagees have in fact retracted their declaration to set up a set-off or counter-claim, and they filed none such in the Registry. They are willing to pay the wages due, but to ascertain this the statement of the master is not enough; it is necessary to examine the wages account. This is not setting up a set-off or counter-claim, for these words clearly mean advances to the master, or receipts by him, other than payments of wages. The Registrar, therefore, had no right to consider this item of 400*l.*, which belonged to the general, as distinguished from the wages account. The 400*l.* is not even a charge upon the ship; it is only a personal debt due from the owners to the master, arising out of the concerns of the ship. It cannot be said to be "an account outstanding and unsettled between the parties to the proceeding," who are the master and the mortgagees.

Twiss, Q.C., contra.

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The mortgagees declared to set up a set-off or counter-claim, and they are bound by that declaration, and its consequences. They have not filed a counter-claim, but they have in fact set up a counter-claim; and this is an unfair attempt to open the general account partially. They claim the benefit of wages paid by the owners, but refuse to consider the owner's liabilities to the master in respect of the ship. The statute does not admit of any such partial dealing with the account; it evidently contemplates this very case, using the term "parties to the proceeding," to include mortgagees or purchasers, as well as the original owners. The expression "enter into and adjudicate upon all questions, and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding," is purposely very large, and clearly means the general account between the master and the ship. The mortgagee takes the place of the owner, and the burden with the benefit. In *The Julindur* (a), decided under 7 & 8 Vict. c. 112, s. 16, the Court, for the interest of the mortgagee, allowed all the accounts between the owner and the master in respect of the ship to be gone into, and observed as follows:—"In this particular case the action is entered in the usual form as against the ship, and an appearance is given on behalf of the mortgagee of the ship; and no doubt the mortgagee is fully intitled to come before the Court, and ask to protect his own interests, and it would be an act of injustice to allow a claim against a mortgagee which could not be substantiated against the owner, as owner of the ship; that is to say, I must take the account with regard to a mortgage, in exactly the same manner as I must have taken it, provided I could have had the owner before me to protect his own interest in the ship" (b). The Court there states the rule generally, and equity requires its application, for the interest of the master as well as for the interest of the ship. Again, in *The Caledonia* (c), decided upon the present statute and section, the Court said, "In the present case, the mortgagees can be in no better position than the owners. What they are attempting is most unfair, and would defeat the whole intent of the statute; they, in fact, say, We will pick out of your account with the owners just such items as suit our purpose, but will have nothing to do with the rest. This the Court will never consent to, and cannot, unless the whole account is gone into, take any notice of the sums so paid by the owners on account of wages, either to the master or the wife" (d).

(a) 1 Spinks, p. 71. (b) Ibid. p. 75. (c) Ante, p. 17. (d) Ante, p. 19.

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It is true that in the result the Court did not compel a settlement of the entire account, but the reason was that the mortgagees had from the first disclaimed any intention of setting up a counter-claim, and had paid 50*l.* as wages since the conclusion of the voyage. The Court expressly says, "In this proceeding against the ship, the liability of the mortgagees was for the wages alone, unless they chose to go into the general account, which the Court will not presume they intended, because they paid 50*l.* after the conclusion of the voyage on account of their own liability." The language of the statute, the authorities, and the equity of the case, are all one way.

DR. LUSHINGTON :—I should be very sorry, if it was supposed I entertained any doubt upon this question. I adhere to every word I said in *The Caledonia*. There the mortgagees declined to put in any counter-claim; they tendered 150*l.* as for wages, and then to prove the tender sufficient, sought to take into account certain sums paid by the owners to the master's wife, without entering otherwise into the general account. The Court held, that as the owners could not do this, so the mortgagees could not; and I say again that it would be altogether inequitable to take by selection particular items of a general account, and exclude from consideration the residue. The general account, if opened at all, must be gone through, and a balance made. I am clearly of opinion that the true construction of the statute requires this in all cases, where a counter-claim is set up, whether the original owners or the purchasers, or the mortgagees are defending. The language of the statute is obviously and intentionally most comprehensive :—"If in any proceeding touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due." I am of opinion that the accounts here spoken of mean the accounts between the master and the ship, exclusive of any private account between the master and the owners for merely extraneous purposes, and that the mortgagee taking possession of the ship, and claiming benefit of items in the account against the master's claim for wages, thereby makes himself a party to the whole account. Why should the master be prejudiced by the sale or mortgage of the ship? The purchaser of a ship takes with all liens, towage, bottomry, salvage, wages. A mortgagee cannot be in a better position than the owner; formerly he had no *locus standi*

The general account, if opened at all, must be gone through, and a balance made, whether the original owner or purchaser or mortgagee is defending.

The general account is the account between the master and the ship, exclusive of any private account between master and owner for merely extraneous purposes.

in this Court at all; and Sir John Nicholl, always anxious to maintain the forms of the Court, would not admit him. There is no doubt that this item of 400*l.* is a liability from the owners to the master in respect of the ship, and that the owners defending the action of the master and setting up a right of set-off, would be compelled to submit to a deduction of this sum. I am of opinion that the mortgagees having declared to set up a counter-claim, and having opened the account, this item now belongs to the accounts arising or outstanding and unsettled between them and the master, who are the parties to the proceeding. I therefore overrule the objection, and confirm the report with costs.

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The item of 400*l.* would be allowed against the owner, and must be allowed against the mortgagee.

Report confirmed with costs.

Clarkson, proctor for the master.

Rothery, proctor for the mortgagees.

THE OLIVE, RICKARD, *Master*.

Proctor's Lien—Garnishee Order—17 & 18 Vict. c. 125, s. 65.

A garnishee order cannot be reviewed by the Admiralty Court; and therefore the payment under a garnishee order of costs pronounced due to a successful party by decree of the Court is satisfaction of the decree, even as against that party's proctor claiming his lien.

THIS was an act on petition brought in on behalf of Edward Leader Kendall, in objection to an application by Clarkson, as proctor for Thomas Rickard, for a monition against him to pay a sum of 109*l.* 2*s.* taxed costs. The question at issue was whether the payment by Kendall of 76*l.* 9*s.* 2*d.* (part of the 109*l.* 2*s.*), under a Judge's garnishee order, to a judgment creditor of Rickard, was, under the circumstances, a valid payment, Clarkson claiming his lien as proctor. The act on petition stated the following facts:—On the 31st December, 1856, an action of master's wages was brought by Clarkson, as proctor for Rickard, against the Olive. Thomas, as proctor for Kendall the mortgagee, appeared and bailed the ship, and declared that he would not set up any right of set-off or counter-claim to the master's demand. A summary petition was then brought in for the master, and a tender was made by the mortgagee of 244*l.*

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8s. 3d. as satisfaction in full, together with the costs due by law. This tender was accepted, and the money paid out. The Registrar reported Clarkson's bill of costs at 78*l.* 19*s.* 8*d.* Thomas objected to the report, and was heard on act on petition. On the 8th of December, 1857, the Judge confirmed the Registrar's report, and condemned the mortgagee in the costs of the petition. On the 16th December, 1857, Messrs. Sharples, judgment creditors of Rickard the master, for a bill drawn by him upon the owners and by them dishonoured, applied to the Court of Exchequer under the garnishee clauses of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 61—67), for an attachment of all debts due from Mr. Kendall to Rickard, and thereupon Baron Bramwell made the following order:—

Sharples and others, judgment creditors, against Thomas Rickard, judgment debtor. Edward Leader Kendall, garnishee.

“ Upon hearing the attorney or agent for the judgment creditors, and upon reading the affidavit of Thomas Smith, I do order that all debts owing or accruing due from the said garnishee to the said judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the said judgment creditors in the Court of Exchequer of Pleas on the 26th day of August, 1857, for the sum of 394*l.* 12*s.*, and upon which judgment the said sum of 394*l.* 12*s.* remains wholly due and unpaid. And I further order that the said garnishee, his attorney or agent, attend me at my chambers in Rolls Garden, Chancery Lane, on Saturday, the 2nd of January next, at eleven of the clock in the forenoon, to show cause why he should not pay the said judgment creditors the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment of debt.

“ Dated the 16th day of December, 1857.

G. BRAMWELL.

(Indorsement.)

“ Order to pay into Court 76*l.* 9*s.* 2*d.*, otherwise adjourned to Friday. Proctor of Rickard to be served with this order.

G. B.

Adjourned to Friday.

G. B.”

A copy of this order was served upon Mr. Kendall (a), and upon the 8th of January, 1858, Baron Bramwell made a second order, as follows:—

(a) *Semble*, not upon Clarkson also as directed.

" Upon hearing the attorneys or agents for the judgment creditors, and upon reading the affidavit of John Maysey, and the order made herein on the 16th of December, 1857, whereby it was ordered that all debts owing or accruing due from the said garnishee to the said judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the said judgment creditors in the Court of Exchequer of Pleas, on the 26th day of August, 1857, for the sum of 394*l.* 12*s.*, and which judgment remains wholly due and unpaid : I do order that the said garnishee do forthwith pay into Court the sum of 76*l.* 9*s.* 2*d.*, the debt due from him to the said judgment debtor, and that the application be adjourned for further consideration till Friday next, at three o'clock. A copy of this order to be served on the proctor of judgment debtor.

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Sharples and
others, judg-
ment creditors.Thomas Rick-
ard, judgment
debtor.Edward Leader
Kendall, gar-
nishee.

" Dated this 8th day of January, 1858.

G. BRAMWELL."

On the 12th January a copy of this order was left with a servant at the office of Mr. Clarkson. On the 15th January, Baron Watson made the following order :—

" In the matter of attachment of debt.—Upon hearing the attorney or agent for the judgment creditors and for the garnishee, and upon reading the affidavit of Frederick Folkard and Walter Henry Phillips, and the order made herein on the 8th of January, 1858, whereby it was ordered that all debts owing or accruing due from the said garnishee to the said judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the said judgment creditors in the Court of Exchequer of Pleas on the 26th of August, 1857, for the sum of 394*l.* 12*s.* : I do order that the said garnishee do forthwith pay to Messrs. Rogerson and Ford, the agents for the judgment creditors, the sum of 76*l.* 9*s.* 2*d.*, the debt due from him to the said judgment (*minus* 1*l.* 1*s.* costs to garnishee), or so much thereof as may be sufficient to satisfy the judgment debt, and that in default thereof execution may issue for the same.

Sharples and
others, judg-
ment creditors.Thomas Rick-
ard, judgment
debtor.Edward Leader
Kendall, gar-
nishee.

" Dated the 15th day of January, 1858.

W. WATSON."

(17 & 18 Vict. c. 125, s. 63.)

This order was left on the same day at the office of Mr. Clarkson, but no notice was taken of it. In obedience to the order Kendall, on the 1st of February, 1858, paid to the judgment creditors the 76*l.* 9*s.* 2*d.* On the 14th of August Clark-

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son's further bill of costs, being the costs of the act on petition in objection to the Registrar's report, was taxed at 30*l.* 2*s.* 4*d.* ; and on the 18th of August Kendall's proctor tendered that sum to Clarkson, but Clarkson refused to accept it. On the 2nd of September, Thomas alleged in act of Court that the sum of 76*l.* 9*s.* 2*d.*, the amount of Clarkson's taxed costs in the wages cause, had been legally paid, and that he had theretofore tendered to him and had paid to the Registrar of the Court at the Bank of England the sum of 30*l.* 2*s.* 4*d.*, which he then again tendered to Clarkson in full for the costs due to him. The petition concluded with a prayer to dismiss the mortgagee with costs. The answer to the act on petition stated that Clarkson's bill of costs in the cause, amounting to 109*l.* 2*s.* (inclusive of the 78*l.* 19*s.* 8*d.*), was not porrected in Court until the 3rd of September, 1858, when, for the first time, the same became due and payable; and that Clarkson had paid the whole of the Court charges and other expenses contained in the said amount, and had not received from Rickard any payment thereof on account. The answer admitted the service at the office of the two Judges' orders of the 8th and 15th of January; it then alleged that Kendall had paid the 78*l.* 19*s.* 8*d.* in his own wrong, and concluded with a prayer for a monition against Kendall and his bail for the payment of the 109*l.* 2*s.* and the costs of the petition.

Annexed to the petition was the affidavit of Maysey referred to in the order of the 8th of January, which proved the service of the first order on Mr. Kendall, and the affidavit of Folkard and Phillips, referred to in the order of the 15th of January, which proved the service of the order of the 8th of January at Mr. Clarkson's office, and the non-appearance of Mr. Clarkson at the time appointed on the 15th of January.

Addams, Q.C., for the act on petition.

Mr. Clarkson had notice of the proceedings, and did not interfere to protect his claim; he must, therefore, suffer for his own *laches*. Mr. Thomas was compelled to pay the money by the order of the Judge, and by section 65 such payment by the garnishee is a valid discharge. This Court is not a Court of Appeal to review the orders of the Judges of the Court of Exchequer.

Twiss, Q.C., *contrà*.

Mr. Clarkson's bill of costs was not a debt when the order of Baron Watson was made, for it was not then porrected or

signed by the Court. A party is not liable as for contempt of Court in not paying costs until the monition to pay them is served upon him; *Smith v. Corry* (a). The original decree of this Court was interlocutory only; the difference between an interlocutory and a final decree is shown by the case of *Dysart v. Dysart* (b). Costs, moreover, are not a debt payable to the party, but to the proctor or solicitor; *Ex parte Bryant* (c). The money, therefore, was not payable to Rickard,—was not, in the words of the order, “a debt due or accruing due” to him. Secondly, the simple service of the orders at the office of Mr. Clarkson was not sufficient notice to him of the proceedings to deprive him of his lien; the orders do not state explicitly the nature of the debt attached.

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DR. LUSHINGTON:—This proceeding arises out of a suit conducted by Mr. Clarkson, for a master mariner of the name of Rickard. Mr. Kendall, the mortgagee of the ship, appeared and made a tender. The tender was accepted, but there was a dispute as to costs, and the Registrar's report, that the costs amounted to 78*l.* 19*s.* 8*d.*, was objected to by the mortgagee. On the 8th December, 1857, I confirmed the report and condemned the mortgagee in the further costs of the act on petition. Mr. Clarkson did not correct his entire bill of costs until the 3rd of September, 1858; but in the meantime Messrs. Sharples, judgment creditors of Rickard, attached the 78*l.* 19*s.* 8*d.* by garnishee order, in Mr. Kendall's hands, and by a subsequent order, of the date of 16th January, Mr. Kendall paid the money to Messrs. Sharples. And the question now before me is, whether this payment is a valid payment and satisfaction of the judgment in this Court, as against Mr. Clarkson claiming the benefit of his proctor's lien. It does not appear precisely upon what ground the money was held to be a debt due and payable from Kendall to Rickard, for the affidavit of Thomas Smith, upon which Baron Bramwell's first order was made, and upon which the two subsequent orders were founded, is not produced. But whatever it was it satisfied the learned Judge, and induced him to make the order. Mr. Clarkson admits the service of the orders at his office, but denies that he was aware that it was notice to him to come in and defend his lien. I am of opinion, however, that it was sufficient notice to him, and at any rate it was so in the judgment of Baron Watson, who made the final order. And this is the ground of my decision now, that a final order has been made. As Dr. Addams observed, this Court does not sit in

The Judge's order for payment was a final order, and cannot be reviewed in this Court.

(a) 1 *Lee*, 432.

(b) 5 *N. of C.* 261.

(c) 1 *Maddox*, Reports, 49.

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Payment under
the order is a
valid discharge
against all
parties.

appeal from the learned Barons of the Court of Exchequer. I must take it for granted that the learned Judge thought this sum was a debt; that he understood all the circumstances, and assumed that Mr. Clarkson did not intend to assert his lien. The 65th section of the Act makes the payment by the garnishee a valid discharge to him as against the judgment debtor; and I am of opinion that, after the orders made in this case, the payment by Mr. Kendall was good against Mr. Clarkson as well as against Mr. Rickard. I must, therefore, reject Mr. Clarkson's application for a monition, and give the costs of this petition.

Thomas and Capes for Kendall.

Clarkson for Rickard.

THE BLAKENEY, *NURSE, Master.*

*Master's Wages—Appearance under Protest—17 & 18 Vict.
c. 104, s. 189—Residence.*

An absolute appearance once given cannot be recalled.

The 189th section of the Merchant Shipping Act, 1854, read with the 191st, extends to masters of ships.

A place of occasional business is not a residence within the meaning of the 189th section of the Merchant Shipping Act, 1854.

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THIS was an action brought by the master of the Blakeney against the ship for his wages, amounting to 39*l.* Mr. Brereton, the owner, appeared, and the ship was released on bail. Subsequently the defendant obtained leave to make his appearance under protest, and to bring in his act. The question raised was, whether the plaintiff was not barred from suing by the 189th section of the Merchant Shipping Act, 1854, the amount being under 50*l.*, and the defendant having a place of residence in London.

The 189th section is as follows:—"No suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any Superior Court of Record in her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared

insolvent, or unless the ship is under arrest, or is sold by the authority of any such Court as aforesaid, or unless any justices, acting under the authority of this Act, refer the case to be adjudged by such Court, or unless neither the owner or master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore." The plaintiff was discharged in the port of London. The defendant's affidavit admitted that he had a house in Blakeney, in the county of Norfolk, and that he was described as of that place in the ship's register, but stated that he had also a place of residence in London, where he principally resided, and where he was actually residing when the plaintiff was discharged; and, moreover, a place of business or office at No. 27, Mark Lane, at which he was usually attendant for the conduct of his business, on the average three or four days a week, and where a letter of the plaintiff's attorney, demanding payment of the plaintiff's claim, had been addressed. It appeared, however, that 27, Mark Lane, was occupied by Messrs. Begbie and Young, and that the defendant's name did not appear on the door.

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Jenner, Q.C., for the plaintiff.

Addams, Q.C., for the defendant.

DR. LUSHINGTON:—The protest must be overruled on both grounds. An absolute appearance was given, and that once given cannot be recalled: all objections to the jurisdiction must be taken on the earliest occasion. Here not only has there been an absolute appearance, but also a supersedeas of arrest thereupon.

An absolute appearance once given cannot be recalled.

No doubt the 189th section of the Act, which applies in terms only to seamen and apprentices, is, when construed with the 191st, applicable to the masters also; but I am of opinion that there is no sufficient proof in this case of the owner residing within twenty miles of the port of London, where the master was discharged. It is clear that the owner's ordinary place of residence was in Norfolk, and that his so-called place of residence in Mark Lane was no residence, but only a place where he occasionally transacted business. I overrule the protest with costs.

17 & 18 Vict. c. 104, s. 189, applies to masters.

Proof of residence in London unsatisfactory.

Protest overruled, with costs.

Barlow, proctor for the master.

Clarkson for the owner.

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March 10.THE GRIEFSWALD, SCHULZ, *Master*.*Collision in the Dardanelles—Jurisdiction—Foreign Judgment
—Res Judicata.*

The Court has jurisdiction over an action brought by a British subject against a foreign ship for a collision in foreign waters.

A defendant relying on the judgment of a tribunal, summoned by a foreign Consular Court, as a bar to the plaintiff proceeding here, is bound to prove that the tribunal had jurisdiction by treaty, usage, or voluntary submission.

Proof held, under the circumstances of the case, insufficient to show that a Court summoned by the Prussian Legation at Constantinople had jurisdiction to pronounce a decree against an English subject, binding in the Court of Admiralty.

THIS was a cause of collision brought by the owners of the English barque Constellation, against the Prussian ship Griefswald.

The collision took place on the 17th of February, 1858, in the roadstead off the town of Dardanelles; and the question was now raised by act on petition in objection to the jurisdiction, whether a decree made by three Judges, Commissioners nominated by a decree of the Prussian Legation at Constantinople, whereby the claim of the captain of the Constellation for indemnification for damages sustained by the collision was dismissed, was under the circumstances stated in the judgment binding, so as to bar the action in the Admiralty Court.

Deane, Q.C., and *Spinks*, for the act on petition.

The collision took place in Turkish waters, where the Court has no jurisdiction. The matter is now *res judicata*; it was the same matter and between the same parties, and was determined by a competent tribunal; *Ricardo v. Garcias* (a). The master of the Constellation, acting for his owners, clearly submitted to the jurisdiction of the Court, and they are thereby bound.

Addams, Q.C., and *Twiss*, Q.C., *contra*.

The Court of Admiralty has jurisdiction. It has jurisdiction

(a) 12 Cl. & F. 368.

everywhere where the tide flows, and therefore in the Dardanelles. In *The Ticonderoga* (a), the Court exercised its jurisdiction in these very waters. And in any case jurisdiction is given by the 527th section of the Merchant Shipping Act, 1854. "Whenever any injury has, in any part of the world, been caused to any property belonging to her Majesty or to any of her Majesty's subjects, by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast thereof, it shall be lawful for the Judge of any Court of Record in the United Kingdom, or for the Judge of the High Court of Admiralty, or in Scotland the Court of Session, or the sheriff of the county within whose jurisdiction such ship may be, upon its being shown to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs, or other officer named by such Judge, requiring him to detain such ship until such time as the owner, master or consignee thereof, has made satisfaction in respect of such injury, or has given security to be approved by the Judge, to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed, shall detain such ship accordingly."

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[DR. LUSHINGTON:—The Court has no doubt on that point.]

The matter is not *res judicata*. The judgment of the Commissioners' Court was not between the same parties as this suit. The present plaintiffs never submitted to the jurisdiction of the Court. The Court wrongfully administered Prussian law. The judgment was a judgment by default only, not on the merits, and is therefore inconclusive; *Plummer v. Woodburn* (b). The judgment was *in personam* only, which is no estoppel to an action *in rem*; *Harmer v. Bell* (c).

DR. LUSHINGTON:—This case comes before the Court under Judgment. very peculiar circumstances.

It appears that so far back as the 12th of June in last year, the vessel proceeded against, the Prussian ship Griefswald, was arrested in a British port at the instance of the owners of the Con-

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this Court.

(a) Ante, p. 215. (b) 4 B. & Cr. 625. (c) 7 Moore, P. C. 286.

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Ground of petition, *res judicata*.

stellation, in a cause of damage. Several defaults were had, a libel given in, and witnesses examined. On the 14th of December an appearance was given by Mr. Rothery for a Prussian owner, and he then prayed to be heard by act on petition against the arrest, and all other proceedings had with respect to this vessel. Accordingly an act on petition was entered into, and proofs brought in. The statement on behalf of the Prussian owner alleges a variety of facts, which I shall notice in detail presently, to the effect that the matter is a *res judicata*, having been tried and determined by a competent Court, and concludes thus:—"That the Judges referees, appointed as aforesaid, formed by the law of nations a competent tribunal to try the question at issue between the owners and master of the vessel Constellation, and the owners and master of the vessel Griefswald; that by the voluntary act of the said master of the Constellation, the said tribunal had and obtained jurisdiction over the said parties, and that by reason thereof, and by reason that the said Judges referees gave a definitive sentence on the said question, it is not competent to the master or owners of the said vessel Constellation again to proceed against the vessel Griefswald, or again to call her master or owners to judgment respecting the aforesaid collision." This presents to the Court the real question for decision.

Act on petition.

I will now examine the particular statements of the pleadings. The act on petition commences by stating that the collision took place in the roadstead off the town of Dardanelles on the 17th of February, 1858. It then states that on the following day, the 18th February, the master of the Constellation applied to Mr. Calvert, who was the British Consul for the Dardanelles, and also the Prussian Vice-Consul, that proper measures should be adopted to compel the payment of the losses sustained by the collision; that the Griefswald should be detained till security was given or the claim adjusted, and that surveyors should be appointed to ascertain the amount of the damage. This request was admitted. Not a word, however, of information is given to the Court of the power of Mr. Calvert, in his capacity of Consul for Great Britain, or of Vice-Consul for Prussia, to do anything of the sort. The Court is left wholly to conjecture by what authority this was done.

It is then stated that surveyors were appointed by the British Consul and the Prussian Vice-Consul, who advised certain repairs to enable the Constellation to proceed to Constantinople. This may have been a wise and expedient measure, but it is not in the

nature of a judicial proceeding to try a cause of collision. A second survey on the Constellation was then held, on the 25th of February; the surveyors were appointed as before by the decree of the British Consul and Prussian Vice-Consul, and the ship was then towed up to Constantinople, where she arrived on the 3rd of March. On the 9th of March the master of the Constellation wrote to Mr. Hornby, Judge of her Britannic Majesty's Supreme Consular Court, praying that application should be made to the Prussian Consul to detain the Griefswald, and the Prussian authorities should be invited to nominate a surveyor, on the part of the Prussian vessel, to take part in a further survey. This letter was communicated by Mr. Hornby to the Prussian authorities. On the 16th of March the master of the Griefswald presented a petition to the Prussian Legation, praying that a mixed Court should be summoned to adjudicate on the case, and on the 17th the Chancellor of the Prussian Legation applied to the British Consular Court to nominate a Judge referee to take part in the mixed Commission. On the 13th of April further application was formally made to the British Consular Court to appoint a Judge referee. I cannot discover that the British Consular Court gave any answer to either of these applications, yet it seems most improbable that this should be the case. On the 10th of May renewed applications were made to the Prussian Legation, praying that a day should be fixed for the nomination by the British authorities of a Judge referee or of a curator to represent the Constellation, or that proceedings should be had *ex parte*, and the petition of the master of the Constellation dismissed. About the same time the British Consulate informed the Prussian Legation that it "was not in a position to recognize" the acts and proceedings demanded, stating two reasons: 1st, that the names of the surveyors had not been given at the time though requested; and, 2ndly, that the captain of the Constellation had left the port. I must put some construction upon the words "not in a position to recognize," and I can put but one construction, namely, that the British Consular Court refused to sanction or to give any authority which might belong to it by law or usage, to any subsequent proceedings to be taken by the Prussian Legation. The remainder of these proceedings are conducted by the Prussian authorities only; if they are valid, they do not derive their authority in any degree from the sanction or co-operation of the British Consular Court, nor, so far as appears, from any British authority or tribunal. On the 27th of May the Prussian Legation appointed three Judges referees to examine the proceedings and decide the case even *in contumaciam*. One of these Judges appointed a day for the hearing, and notice was forwarded to

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Mr. Hornby, who, by official note of the 2nd of June, declared he could not approve of what had been or might be done. On the 5th of June, the Judges referees dismiss the case with costs. These facts, as stated in the act on petition, are not denied by the plaintiffs; they are common to both parties; the defendants rely on them as establishing a defence of *res judicata*.

Answer.

The answer to the act on petition commences by referring to the 6 & 7 Vict. c. 94, and the Order in Council of the 27th of August, 1857, issued in pursuance thereof. The effect of this statute and Order in Council is to appoint a Judge of the Supreme Consular Court of Constantinople, and to confer on him jurisdiction in all matters which might be in difference between British subjects or between British subjects and the subjects of the Porte, or between British subjects and the subjects of any foreign power. The 13th section of the order gives the Judge power to promote the settlement of any civil suit by amicable agreement, and with the consent of the several parties to refer the decision of any such suit to one or more arbitrators, and to take security for the parties that they should be bound by the result of the reference. I have been unable to obtain any information how the powers so conferred are practically exercised. Of course the Act of Parliament and subsequent Order in Council confer valid jurisdiction over British subjects, for Parliament may legislate for British subjects anywhere; but how the subjects of a foreign power can be brought within the jurisdiction so conferred, save by treaty, I have no means of forming an opinion. The answer simply refers to the Act and the Order in Council, and then stating the collision and the application of Captain Straker to the British Consular Judge, which I have before mentioned, alleges that various communications were held between the British and Prussian authorities, but without result, up to the end of April, and that Captain Straker, despairing of redress, then left Constantinople with his ship; that subsequently the proceedings pleaded in the act on petition were held, and the judgment given. And the answer then denies that this judgment is a bar to the present action.

Was the Court a competent Court? The burden of proof is upon the defendants to show that it was.

The main question in the case is clearly, whether the Court summoned by the Prussian Minister had authority to adjudicate the case at all; if that is settled in the negative, it will be unnecessary to consider what the decision was, and whether the grounds of the decision were valid. Now I have not the slightest information as to the power or authority of the Prussian Minister to summon this Court to adjudicate on the grievance of a

British subject. If it does exist by treaty or usage, it was incumbent upon those who now appear on behalf of the Prussian vessel proceeded against to give the Court adequate information. Nor do I find any sufficient proof of authority by the voluntary submission of Captain Straker. Captain Straker's application was to the English authorities, not to the Prussian; his application was that proper measures should be adopted to compel satisfaction of his damages; but there is no proof that the ulterior measures adopted were the proper or customary measures, they were certainly disclaimed by the British Consul, and were taken in the absence of Captain Straker and without his consent.

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No proof of authority by treaty, or by voluntary submission of both parties.

With respect to the decree itself, I have only to make one observation. The Court claimed to act upon the maxim "*actio sequitur forum rei*," pronounced a decree *in contumaciam* against Captain Straker, according to some article in the Prussian code. This seems to me a somewhat extraordinary proceeding. The municipal law of Prussia could have nothing to do with the question in issue; which must be governed by maritime law, as it prevails in the maritime states of Europe.

The Court wrongly administered Prussian law.

I decline entering further upon any examination of this decree, or of the reasons assigned for it, because the true question is, whether the Judges so appointed had any jurisdiction or right to make any decree at all which could be binding upon Captain Straker or his owners, and be pleadable in this Court as *res judicata*.

In cases of collision it has been the practice of this country, and, so far as I know, of the European states and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice it is manifest is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable. The remedy *in personam* may also exist, and we know that in this country it is frequently resorted to where the parties are resident in England. It might be that similar proceedings are had in a foreign country, namely, *in rem* or *in personam*. I apprehend that if a party were plaintiff in this Court *in rem*, and the Court were satisfied by proof that there had been a judgment or proceeding on the same question *in personam*, the party proceeding here having been the plaintiff in the other Court, this Court would not allow the suit to proceed, and that, too, whether the proceedings *in personam* had been in a British or a foreign Court, provided always that the case did not fall within certain

A party aggrieved by a collision may pursue his remedy against the ship wherever found;

but, as a general rule, he will be estopped from proceeding, if he has had his claim *in personam* in the same matter considered by a competent Court elsewhere.

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Here the Court
was not com-
petent.

Protest over-
ruled.

exceptions to the plea of *res judicata*, which I need not now notice. The question here is simply, Do these proceedings constitute a *res judicata*? Such a judgment must be pronounced by a competent Court, and with respect to persons over whom it is intitled to exercise jurisdiction. The tribunal which pronounced the judgment now under consideration is a purely Prussian tribunal sitting in a foreign country. It is manifest that such a tribunal could exercise jurisdiction over a British subject only by virtue of treaty, or by long-existing usage, or by the act of the party voluntarily submitting to such jurisdiction. As to treaty, there is none alleged. As to usage, it is so mixed up with a voluntary submission to Prussian authority that I cannot consider it separately; and I have already said that I do not consider the voluntary submission to be proved. I, therefore, must overrule the protest; I do so with great respect to the Prussian Government, but in the firm conviction that the judgment pronounced by the Prussian tribunal cannot be sustained on any legal principles known to this Court.

Clarkson, proctor for the Constellation.

Rothery for the Griefswald.

THE ELISE.

Salvage—Award of Commissioners of Cinque Ports—Res Judicata.

Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the Commissioners of Salvage for the Cinque Ports to adjudicate the matter. No notice of the intended meeting was given to any of the salvors, and it was proved that it was not usual to give any such notice.

At the meeting of the Commissioners one set of salvors was unrepresented, but it was proved that they were aware of the meeting, and were at hand. The Commissioners made an award upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, and brought their action in the Admiralty Court. *Held*, that the award was no bar to the action, the plaintiffs not having been parties to the first decision.

Quere.—Whether the master of a ship is the agent of the owner to compromise a salvage claim, the owner being at hand, and giving no authority.

THIS was a cause of salvage brought by John Monday, master of the smack Prince Arthur, and the owners and crew, against the brig Elise, her cargo and freight. The owners

of the brig and her cargo appeared under protest, and brought in an act on petition in objection to the arrest, and in bar to all proceedings. The question raised for the decision of the Court was, whether an award of salvage made by three Commissioners of Salvage for the Cinque Ports was, under the circumstances, a bar to the action.

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The following were the facts of the case:—On the 21st of December, 1858, salvage services were rendered off Ramsgate to the *Elise* by the crew of a French lugger, the crews of the Ramsgate steam-tug and life-boat, and by the crew of the *Prince Arthur*. The master of the *Elise* settled with the French crew; and the Ramsgate Harbour Company, the owners of the tug and life-boat, refused to allow those of the crew of their vessels who were in their employ to make any claim of salvage. On the afternoon of the 28th of December, Mr. Clarke, the agent of the salvors, waited upon Mr. Webber, the agent of the brig at Ramsgate, and asked for a settlement of the claim; Mr. Webber refused to recognize it, or at least to recognize the claim of the crew of the *Prince Arthur*. Mr. Clarke thereupon immediately communicated the fact to Monday, and received instructions to commence proceedings forthwith in the Court of Admiralty. An affidavit to lead the warrant of arrest was then prepared and put in a letter, to be sent to a proctor in London. On the evening of the same day Mr. Clarke learnt that a meeting of the Commissioners of Salvage for the Cinque Ports had been summoned by Mr. Webber for the next day, to decide upon the case: he thereupon detained his letter containing the affidavit, and advised Monday to go before the Commissioners, and present an independent claim on behalf of the smack. At seven o'clock in the same evening a meeting of the salvors was held, and it was agreed to draw up a declaration or statement of the joint services by all the salvors, to be laid before the Commissioners, and to share the money awarded equally. A declaration was then accordingly drawn, and signed by five of the salvors, one of them being Reading, the captain of the tug. It was asserted on one side, and denied on the other, that Monday was present at this meeting; but none of the owners and crew of the *Prince Arthur* were present, and the declaration was not signed by Monday. On the 29th of December, the Commissioners sat at the Royal Oak; they received the declaration, and heard various witnesses. Monday was not present, and he deposed that he was prevented from going in at the door by Reading, the captain of the tug, who told him it was no use, as the Commissioners would not consider his claim, and he would only injure

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the claim of the others. No official notice of the intended meeting was given to Monday, or to the owners or crew of the *Prince Arthur*. The Commissioners made the following award:—

“At a meeting held the 29th day of December, 1858, at the Royal Oak Inn, situate in Ramsgate, in the county of Kent:—Present, John Cutler, Henry Benson and James Corbin, three of the Commissioners nominated and appointed by the Most Noble James Andrew Marquis of Dalhousie, Knight of the Most Noble Order of the Thistle, Lord Warden of the Cinque Ports, to put in execution within the liberty and jurisdiction of the said ports and their members, certain powers and authorities given in and by an Act of Parliament made and passed in the second year of the reign of his late Majesty George the Fourth, intituled ‘An Act to continue and amend certain Acts for preventing the various Frauds and Depredations committed on Merchants, Shipowners and Underwriters, by Boatmen and others within the Jurisdiction of the Cinque Ports, and also for remedying certain Defects relative to the Adjustment of Salvage under a Statute made in the Twelfth year of the reign of her late Majesty Queen Anne.’

“The said Commissioners having taken the oath prescribed by the said Act, and had before them the respective parties interested, do find that the brig *Elise*, belonging to Roscoff, whereof Eugene Robin is master, being on a voyage from Girgenti, bound to Dunkirk, laden with sulphur, was in great distress, having been in collision with the North Sand Head floating light vessel, whereby the brig was much damaged, and her master and crew having during the collision got on board the light vessel, fearing that the brig would founder; the brig soon afterwards drifted clear of the light vessel, only one of her crew, an apprentice, remaining on board, in which state she was shortly afterwards boarded first by three French mariners, being part of the crew of the Calais fishing-boat *Jeune Jacob*, and afterwards by Daniel Reading and others, boatmen of Ramsgate, part of the crews of the steam-tug *Vulcan*, of Ramsgate, and also of a life-boat and fishing-smack also belonging to Ramsgate, the complete crews of which steam-tug, life-boat, and fishing-smack, then consisted of twenty-seven persons—that is to say, the crew of the said steam-tug of ten persons, the crew of the life-boat of twelve persons, and the crew of the smack of five persons, and the said brig was afterwards conducted in safety into Ramsgate harbour

by the aid and assistance of the above French mariners and of said Daniel Reading and others. The said Commissioners having duly weighed and considered all the services rendered to the said brig as aforesaid (except those rendered by the French mariners, for which they have been already paid by agreement), do hereby award and order that the said master or his agent shall pay to the said boatmen of Ramsgate the sum of 82*l.*, and that the same shall be accepted and received by them in full for all their said services.

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“ By the Commissioners,

“ MARTIN L. & CHS. DANIEL, Registrars.”

The present plaintiffs refused to receive any share of the money so awarded, and brought the present action.

In support of the act on protest the following affidavit (amongst others) was brought in :—

“ *Affidavit of Martin Long Daniel.*

“ Appeared personally Martin Long Daniel, of Ramsgate, in the county of Kent, gentleman, and made oath that he is, and has been for twenty-six years and upwards, one of the Registrars of the Lord Warden's Commissioners of Salvage, appointed to act at Ramsgate aforesaid, having been for part of that time sole Registrar and for the greater part the senior Registrar; that during the time he has so acted as Registrar, as aforesaid, the practice which has invariably prevailed has been as follows (that is to say); the Registrar or Registrars have, upon the application of any person or persons, sent a notice in writing to each of the said Commissioners, for the time being resident at Ramsgate, convening a meeting of the Commissioners, and appointing the time and place for holding such meeting, but that no other notice has been sent of the meeting by or on behalf of the Commissioners to any other person. That the Commissioners accordingly meet at the place appointed, being an hotel, and at such meeting all parties interested have a right, and all who apply are permitted, to attend, and that such of the parties interested as they may select, but not all such parties, attend accordingly. That the room in which the meetings are held not being very large, such meetings are not considered as open to the public, but that parties not interested have occasionally applied for permission to attend, which permission has never been refused. And this appearer further made oath that at the Commissioners' meeting, held on the 29th day of December last, to

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adjudicate on the amount to be paid for salvage services rendered to the above brig *Elise*, all parties claiming as salvors who offered to attend were permitted to attend, and that several claimants were present, and that it was stated by the parties so present that they were authorized to represent all the claimants; but they also stated that there was one of the crew of the smack *Prince Arthur* in the hotel, but not present at the meeting, who was ready to attend if wanted, but that in the investigation of the claims referred to, his attendance was not asked for by any of the parties present, or deemed necessary by the Commissioners, and therefore that his attendance was not required.

“ MARTIN L. DANIEL.”

Addams, Q.C., and *Spinks*, for the act on protest:

Jenner, Q.C., and *Deane*, Q.C., *contra*.

DR. LUSHINGTON :—The act on protest pleads that the matter now in question has been already adjudicated between the parties by a competent tribunal. If the plaintiffs were proved to have been parties to a determination by a competent tribunal, this Court would certainly hold its hand, even if the proceedings before the inferior Court had not been conducted in the most perfect manner. In the present instance the tribunal was undoubtedly competent, and the only question is, whether the plaintiffs were parties to the decision?

Were the plaintiffs parties to the decision of the Commissioners?

Quære.—Is the master agent for the owner to compromise a salvage claim if the owner is at hand and gives no authority?

In the first place, although the master of a ship is on land as at sea agent for the crew to bind them by agreement in respect of salvage compensation, I doubt whether he is agent for the owner for that purpose, when the owner is at hand and gives him no authority. Here the owner of the smack was at hand, and I do not find that he gave the master authority to enter into any agreement for the settlement of his salvage claim. But passing this question of law by, did Monday, the master of the smack, in anywise render himself, or those whom he represented, a party to the inquiry before the Commissioners? The entire burden of proof, it must be remembered, falls upon the defendants; and the Court must permit the action to continue, unless they clearly show that the plaintiffs were party to the former decision, and suffered, if they suffered at all, by their own laches. I shall not examine the contradictory statements of the witnesses in detail, but I look to the declaration upon which the Commissioners acted. It is not signed by Monday, and it is a

most insufficient statement of the services of the Prince Arthur. I have certainly come to the conclusion that Monday never agreed to this declaration, and never approved of it. It is further clear that the agent of the brig resisted Monday's demand, that Monday intended to bring the case to adjudication before this Court, and that he was only induced not to do so immediately by Mr. Clarke advising him to go before the Commissioners and urge his claim independently. On the 29th of December the Commissioners sat, and made their award. But I do not find that any one was authorized to represent the Prince Arthur, or even that any one did in fact represent the Prince Arthur. The first duty of such a tribunal is to have before them the parties interested, or to give them due notice; yet neither of these things was done.

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The plaintiffs were not represented at the meeting, and they had no notice; they were therefore not parties to the decision.

It would be greatly inconsistent with justice to hold the salvors barred by such proceedings. I much regret that the Commissioners, who might be of great service by adjudicating on questions of small amount at small expense, should conduct their proceedings so loosely, and with such a deficiency of care and caution in essential particulars, as to amount at least, in the present case, to a disregard of justice. I overrule this protest with costs.

Protest overruled with costs.

Dyke, proctor for the salvors.

Rothery, proctor for the Elise.

THE IRON-MASTER, — CRAIG, *Master*.

Collision—Report of Registrar and Merchants—Evidence as to Value of Ship.

On an appeal from a report of the Registrar and merchants new evidence is admissible.

In estimating the value of a vessel at the time of a collision, whereby she was lost, the best evidence is the opinion of competent persons who knew the vessel shortly before the time of loss; next, the opinion of persons well conversant with shipping generally. The original price of the vessel, the cost of repairs done, the amount at which she was insured, &c., are evidence of value, but evidence of inferior weight.

THIS was an appeal from a report of the Registrar and merchants. March 16.

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The original action was for a collision on the 7th of March, 1858, whereby the brigantine Tarsa was sunk and utterly lost. The Court pronounced for the damage, and the amount was referred to the Registrar and merchants. They reported the damage at 1,398*l.*, assessing the value of the Tarsa at the time of loss at 925*l.* From this report the owners of the Tarsa appealed. An act on petition and answer, and fresh evidence thereon, were brought in.

Addams, Q.C., and *Twiss*, Q.C., against the Report.

Deane, Q.C., and *Spinks*, in support of the Report.

Judgment.

DR. LUSHINGTON :—The question now under consideration is, what shall be deemed the proper value of the vessel Tarsa, and it comes before the Court on an objection taken by the owners of the Tarsa to the report of the Registrar and merchants.

On an appeal
from a Regis-
trar's report
new evidence
is admissible.

Before entering on the particulars of the case it may be expedient to make a few observations upon the course the Court takes in so reviewing a report objected to. Very many years since a discussion was raised before Lord Stowell, as to whether the Court should proceed only on the original evidence produced before the Registrar, or should permit additional evidence to be brought in. Lord Stowell decided in favour of the reception of fresh evidence, and this on a balance of conflicting considerations. By the admission of evidence not produced before the Registrar and merchants this result might follow: their original finding might be perfectly correct, according to the evidence before them, and then the case might be changed by the new proofs and a different decision arrived at. This certainly is not a very satisfactory result, it might possibly lead to the keeping back of proper evidence before the Registrar and merchants; and, moreover, it has this disadvantage, that the new evidence is not submitted to the consideration of the merchants, who have a practical knowledge of the subject-matter. In this view, therefore, the admission of new evidence is open to great objection; but, on the other hand, it is right and fit that there should be an appeal to the Court in questions which may be of great value and importance: and as much that passes before the Registrar and merchants cannot be accurately transmitted to the Court, it is desirable, for the purposes of justice, that the Court should be furnished with adequate evidence. It was upon a balance of these considerations that Lord Stowell admitted further evidence. Of course I follow the example; and I have only to

add what, indeed, is well known, that the Court will never overrule a report of the Registrar and merchants without being perfectly satisfied that upon the evidence which it is its duty to take into consideration the report ought not to be maintained.

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The fundamental principle in determining the measure of damages in all these cases of collision is, that the party to blame is considered a wrong-doer, and the party injured is intitled to *restitutio in integrum*, to full and complete indemnity for all the losses sustained. In this case the loss is confined to a single item, the value of the ship destroyed. The evidence adduced is, as usual, of different kinds; and I think it convenient here to state how the Court ranks these different kinds of evidence in order of importance, the question being the value of the ship at the time of the collision.

What was the value of the ship at the time of collision?

The best evidence is, first, the opinion of competent persons who knew the ship shortly previous to the time it was lost: that evidence is manifestly intitled to most weight, because, assuming their competency to form a just judgment, they had a personal knowledge of the state and condition of the vessel herself, whereas all other persons, however skilful, could only draw general inferences from their acquaintance with the prices of vessels somewhat similar about the same time. The second best evidence, is the opinions of persons such as I have just described, persons conversant with shipping and the transfers thereof. In addition to testimony of this description, many other circumstances may be called in aid,—as the original price of the vessel; the amount of repairs done to her; the sum at which she was insured, and other circumstances of a similar nature. It is manifest that facts of this kind, though not to be wholly excluded, have a slighter bearing upon the case; for after a lapse of years the amount of price might, from a change of circumstances, have little bearing upon the question: so, to a certain extent, it would be with respect to repairs and insurances.

The best evidence is the opinion of competent persons who knew the ship shortly before the loss.

Next, the opinion of other persons well conversant with shipping generally.

The original price of the vessel, the price of repairs, amount of insurance, &c., to be considered, but by no means as conclusive.

I now proceed to an examination of the facts of the case. The vessel was run down on the 7th of March, 1858, and the question to be determined is the value at that time.

Facts of the case and evidence.

The act on petition states the vessel to be a brigantine of 127 tons new measurement, built, in 1853, in Prince Edward's Island, and to have cost unmetalled 2,000*l*. That in consequence of a previous collision repairs were done, in 1857, to the amount of 877*l*.; that the outfit for the last voyage cost 169*l*.; that before

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the vessel sailed Redway contracted with Tanner for his moiety (he being the owner) for 825*l.*, which he had been compelled to pay.

The answer is very short. That the extensive repairs in 1857 show that the vessel must have been in a very defective state; that the additional value of the vessel, in consequence of repairs, rarely exceeds one-third of the amount expended for materials, after deducting the charge for the use of tools, &c. I do not place great reliance upon the original price, because the value of ships is so constantly fluctuating; or upon the contract to purchase the moiety, for that transaction is left too much in the dark: still less reliance can I repose upon the answer, for it is obvious that the repairs are to be attributed to the collision, and are no proof that the ship was in a defective state. And as to the effect of repairing upon the value of the ship, it is manifest there must be some misunderstanding, for I cannot believe it possible the shipowners should lay out money in repairs unless they had an equivalent to the money expended.

The evidence before the Registrar and merchants was very short. Mr. Harrison, a surveyor of shipping, who surveyed in 1857, estimated the value at 1,600*l.*; Mr. Sheppard stated that, in 1857, she was surveyed for an insurance office, and insured for 1,630*l.*; he estimates her value, in 1858, at from 1,530*l.* to 1,600*l.* Mr. Bayley made an affidavit on the other side. He is a gentleman belonging to a firm well known to all who practise in this Court, and no doubt his evidence deserves great attention; but, I must observe, I should be inclined to place greater reliance upon it if there had not, as it appears to me on consideration of the whole, been too great a disposition to depreciate the claim. Perhaps this may arise from his being accustomed to value for insurances, which are governed by different principles. Moreover, he never saw the vessel, and can speak only to the market value of shipping; he estimated her value, exclusive of stores and provisions, at 740*l.* The Registrar and merchants allowed 935*l.*

I must now turn my attention to the evidence produced since the report was made. 1. The evidence of Mr. Wishart, a shipwright, and who knew the vessel well, and up to March, 1858; his estimate is from 1,500*l.* to 1,600*l.* 2. Mr. Maypee, surveyor of shipping, who surveyed her in 1857; he reports that, save from the collision, she was in the best possible condition. I

pass by Mr. Redway's affidavit, because he is the party in the cause.

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The evidence produced in support of the report contains a larger amount of affidavits, and from persons of great experience in the sale of vessels of all kinds, and especially those built in Prince Edward's Island. I have no doubt that the facts to which they depose, and the values they estimate the vessel at, though not a little varying, are the result of their honest judgment. But the fact is, that they never saw the vessel in question. This evidence, therefore, is not intitled to the same weight as that of persons of experience who had actual knowledge of the vessel herself. Moreover, though I do not consider the price given as a criterion of the value to be assessed, it is evidence, and strong evidence, too, when looking to the opinion of those gentlemen, that this identical ship did actually fetch 2,000*l*. I think it would be a useless task to go through their affidavits in detail; they are all of the same character, and I doubt not the facts are truly stated, but when I consider the whole evidence I am not led to the same conclusions.

It is with great distrust that I overrule a report of the Registrar and merchants, but I have some fear that the rules applicable to insurances are, perhaps unwillingly, allowed to have too much weight: rules arising *ex contractu*, not, as in this case, *ex delicto*. In this case there must be full and ample compensation. I give 1,200*l*. and costs.

Report over-
ruled with
costs.

Clarkson, proctor for the Tarsa.

Rothery for the Iron-Master.



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April 1.THE INDOMITABLE, M. W. KETT, *Master*.*Bottomry—Maritime Risk.*

The expression of maritime risk, to be collected from all the terms of the instrument, is essential to the validity of a bottomry bond.

Stipulations in an instrument purporting to be an agreement to hypothecate the ship, which, taken together, exclude the implication of maritime risk:—
Common rate of interest, to extend beyond the date of arrival at the port of destination and until payment of the principal; insurance of the ship beyond the date of arrival, the same to be made by the lenders and paid for by the borrowers. This conclusion not rebutted by a stipulation to pay a bill of exchange for the amount of the money lent within thirty-four days after arrival, the bill not being expressed to be drawn as a collateral security.

Semble. If sea risk is directly expressed, a stipulation that the ship shall be insured for the voyage by the lenders, and the premium be repaid by the borrowers, is immaterial.

THIS was a cause of bottomry, opposed by the mortgagees of the ship in possession. The instrument sued upon was as follows:—

“Articles of Agreement made this 22nd day of March, one thousand eight hundred and fifty-eight, between Major Woodhouse Kett, master of the steam screw-ship Indomitable, belonging to the port of London, and now lying in the roadstead of Madras, in the East Indies, of the one part, and James Ainelie, Robert Orr Campbell, Richard Barnes Bell, and William Scott, respectively, of Madras aforesaid, Esquires, merchants and agents, and there carrying on business in co-partnership together, under the style or firm of Binny and Company, of the other part.

“Whereas the said ship sailed from London on the 12th of November, one thousand eight hundred and fifty-seven, bound to Madras, carrying British troops, and laden with sundries. And whereas in the due prosecution of her said voyage, the said ship called at St. Vincent's, Cape de Verd Islands, and there purchased and shipped a large quantity of fuel, for the use of the said ship in the further prosecution of her said voyage. And whereas the price of such fuel amounted to the sum of four hun-

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dred and seventy-one pounds sterling, and in payment for the same the said Major Woodhouse Kett drew a bill of exchange on the directors of the Australian Auxiliary Steam Clipper Company, in favour of the Patent Fuel Company, limited, for the said sum of four hundred and seventy-one pounds sterling, bearing date the 5th of December, one thousand eight hundred and fifty-seven, and payable at thirty days' sight. And whereas the said fuel was properly and necessarily used and consumed by the said ship in the due prosecution of her said voyage. And whereas the said bill of exchange was dishonoured by the drawees, protested for non-acceptance, and forwarded to Messrs. Parry and Company, of Madras aforesaid, merchants and agents, for realization, with expenses, from the said Major Woodhouse Kett, as drawer thereof. And whereas the said ship arrived in the Madras roadstead on the 23rd of February, one thousand eight hundred and fifty-eight, and on the 27th of February, one thousand eight hundred and fifty-eight, the said Major Woodhouse Kett received a letter from Messrs. Wilkins and Shaw, of Madras aforesaid, as attornies for the said Messrs. Parry and Company, demanding payment of the said bill, with expenses, and stating that unless the same was paid, or sufficient security for the amount given forthwith, proceedings would at once be adopted to compel payment. And whereas the said ship has failed in getting employment at Madras, and the owners of the said ship and the parties now interested therein have not remitted the said Major Woodhouse Kett any funds for payment of the said bill of exchange, or for meeting the necessary disbursements of the said ship, nor have the owners of the said ship, or the parties now interested therein, made any arrangement for providing such funds, or making the same available at Madras. And whereas it has been determined that the said ship shall proceed to Calcutta, but she cannot leave the Madras roads until the said Major Woodhouse Kett has taken up and paid the said bill of exchange, with all interest and charges, and has obtained funds as well for that purpose as for the disbursements of the said ship. And whereas the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell, and William Scott, as such co-partners as aforesaid, and at the special instance and urgent request of the said Major Woodhouse Kett, as such master as aforesaid, have agreed to lend and advance to the said Major Woodhouse Kett, the sum of fourteen thousand seven hundred and ten Company's rupees, for the purpose of enabling him to take up and discharge the said bill of exchange, with interest and charges, and of placing him, the said Major Woodhouse Kett, in sufficient funds to meet the disbursements of the said ship, on

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the terms and conditions following: that is to say,—that he, the said Major Woodhouse Kett, shall forthwith proceed to Calcutta, and shall immediately on his arrival at Calcutta consign and place the said ship to and in the hands of Messrs. Jardine, Skinner and Company, of Calcutta aforesaid, merchants and agents, to be laid on and loaded as hereinafter mentioned; that he, the said Major Woodhouse Kett, shall draw a bill on the said Messrs. Jardine, Skinner and Company, in favour of the said firm of Binny and Company, or order, for the sum of fifteen thousand Company's rupees, being the equivalent of the said sum of fourteen thousand seven hundred and ten Company's rupees, at the exchange of one hundred and two per centum, and payable at thirty days' sight; that he, the said Major Woodhouse Kett, shall also repay to the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell, and William Scott, or to the said Messrs. Jardine, Skinner and Company, as their agents in Calcutta, on demand, all such money as the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, shall pay or disburse by way of premia for effecting an insurance on the said ship from Madras to Calcutta, and until the said vessel shall take her departure from Calcutta on some outward voyage, with interest at the rate of nine per centum per annum, on all such money as last aforesaid, from the time or respective times of payment thereof, by the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, up to the time of such repayment; that he, the said Major Woodhouse Kett, shall charge, pledge and hypothecate, the said ship as and by way of security for the due payment of the said last-mentioned bill of exchange for the said sum of fifteen thousand Company's rupees, and for the due payment of all such other sums of money as aforesaid, and all such interest as aforesaid; and whereas in pursuance and part performance of the said agreement between the said parties hereto, the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, as such co-partners as aforesaid, did, on this 22nd day of March instant, advance to the said Major Woodhouse Kett the sum of fourteen thousand seven hundred and ten Company's rupees, as he, the said Major Woodhouse Kett, doth hereby acknowledge; and with such money the said Major Woodhouse Kett has paid and discharged the full amount due for principal, interest, costs and charges, upon and in respect of the said first-mentioned bill of exchange for four hundred and seventy-one pounds sterling. And whereas the said Major Woodhouse Kett, in further performance of the said agreement between the said parties hereto, hath drawn his bill of exchange at thirty days'

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sight on the said Messrs. Jardine, Skinner and Company, for the sum of fifteen thousand Company's rupees, being the equivalent for the said sum of fourteen thousand seven hundred and ten Company's rupees, at the exchange of one hundred and two per centum; and in further performance of the said agreement the said Major Woodhouse Kett hath agreed to enter into the covenants hereinafter contained. Now these presents witness, that for the considerations aforesaid he, the said Major Woodhouse Kett, for himself, his heirs, executors and administrators, doth hereby covenant, engage and agree to and with the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, their executors, administrators and assigns, that he, the said Major Woodhouse Kett, shall and will forthwith proceed with the said ship to Calcutta, and shall and will immediately on his arrival at Calcutta consign and place the said ship to and in the hands of the said Messrs. Jardine, Skinner and Company, for the purpose of being laid on and loaded for such port or ports as the said Messrs. Jardine, Skinner and Company, shall consider most advisable or expedient; that within thirty-four days after the arrival of the said ship at Calcutta aforesaid, he, the said Major Woodhouse Kett, or whosoever may act in lieu of him, or in case of his absence perform the duties of master of the said ship, shall and will take up and fully discharge the said bill of exchange for the said sum of fifteen thousand Company's rupees, and all interest that may have become due for or in respect thereof, in case such bill of exchange shall not have been previously paid and discharged by the said Messrs. Jardine, Skinner and Company; that within the period last aforesaid he, the said Major Woodhouse Kett, his heirs, executors or administrators, shall and will repay to the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, or the survivor of them, his executors, administrators or assigns, or to the said Messrs. Jardine, Skinner and Company, as their agents at Calcutta, all such money as the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, or the survivor of them, shall have paid or disbursed by way of premia for effecting an insurance on the said ship from the port of Madras aforesaid to Calcutta, and until the said ship shall have taken her departure from Calcutta on some outward voyage, together with interest on all such money as last aforesaid, at the rate of nine per centum per annum, from the time or respective times of the payment thereof, up to the time of such repayment thereof as aforesaid. And for further securing the payment to the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, or the survivor of them, his executors,

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administrators or assigns, or the said Messrs. Jardine, Skinner and Company, as their agents at Calcutta, of all such sums of money as aforesaid, and all such interest as aforesaid, he the said Major Woodhouse Kett doth hereby bind, pledge, mortgage and hypothecate the said ship, with her tackle, apparel and appurtenances. And the said Major Woodhouse Kett doth hereby declare that the said James Ainslie, Robert Orr Campbell, Richard Barnes Bell and William Scott, their executors, administrators and assigns, shall have a charge and lien upon the said ship, and her tackle, apparel and appurtenances, for securing the payment to them of all such sums of money as aforesaid, and all such interest as aforesaid. In witness whereof, the said parties to these presents have hereunto respectively set their hands and seals at Madras aforesaid, the day and year first above written.

M. W. KETT. (Seal.)

JAMES AINSLIE. (Seal.)

R. O. CAMPBELL,
by his Attorney.

JAMES AINSLIE. (Seal.)

RICHD. B. BELL. (Seal.)

WM. SCOTT." (Seal.)

The question put in issue was, whether the instrument purporting to be an agreement to hypothecate contained a sufficient expression of maritime risk.

The *Admiralty Advocate* and *Jenner*, Q.C., for the bondholders.

Deane, Q.C., and *Spinks* for the mortgagees.

In the argument the following cases were referred to:—*The Emancipation* (a); *The Nelson* (b); *Stainbank v. Fenning* (c); *Stainbank v. Shepard* (d).

April 5.

Judgment.

On the 1st of April DR. LUSHINGTON gave judgment as follows:—I have delayed my judgment in this cause solely from a wish that the party against whom the judgment will be given should be satisfied that mature consideration had been given to the case. From the time I perused the papers I had no doubt upon the material question of fact on which the decision of the Court will turn. The principles upon which the Court must proceed are acknowledged on all hands; and the application of

(a) 1 W. R. 124.

(b) 1 Hagg. A. R. 176.

(c) 11 C. B. 51.

(d) 13 C. B. 418.

those principles to the facts of the case appeared and do appear to me equally clear.

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April 5.

There is one rule established by all authorities : that this Court has no jurisdiction to enforce any bond or obligation entered into by the master of a vessel unless it be a bottomry bond, of which maritime risk is an ingredient essential to its vitality.

The Court can only enforce a bottomry bond that contains sea risk.

On the 11th of October, 1858, an action of bottomry was entered against this ship on behalf of Messrs. Binny & Co., of Madras, and an appearance was given by the mortgagees in possession.

The history of the ship is as follows :—She was originally the property of the Australian Auxiliary Steam Clipper Company ; but on the 15th of August, 1857, was mortgaged to the present mortgagees in possession. On the 12th of September, 1857, she sailed for Madras with troops and a cargo. On her outward voyage the master, at the Cape de Verd Islands, purchased fuel to the amount of 471*l.*, for which he drew a bill upon his owners. This bill was dishonoured and forwarded to Messrs. Parry & Co., of Madras, for realization. On the 23rd of February, 1858, the vessel reached Madras, when payment of the dishonoured bill was demanded of the master, and legal proceedings threatened. It is not necessary for me to recite in detail the proceedings at Madras, nor the circumstances attendant upon the dealing with the outward freight. They might be very material if the Court was in a position to entertain the consideration of them. I shall advert only to what I deem pertinent to my decision. The master, being without money or credit (I assume these averments to be true), applied to Messrs. Binny & Co. for an advance of money to pay the dishonoured bill and to enable him to commence a fresh voyage. I assume, again, that the master was so circumstanced (though I give no opinion upon it), that he might have granted a valid bottomry bond. Messrs. Binny & Co. advanced 14,710 rupees to pay off the bill and to cover the disbursements of the ship at Madras and the outfit for a voyage to Calcutta ; and they did so under an agreement which is alleged to be a bottomry bond. And here, though I do not mean to rely upon the fact as guiding my judgment, I deem it right to observe that this ship was peculiarly circumstanced ; she was, and the fact must have been known to the master, mortgaged at the time she left England.

Facts of the case.

I now come to the consideration of the agreement which is Bond.

1859.

April 5.

said to be a bottomry bond, capable of being enforced in this Court. This agreement is dated 22nd of March, 1858, and appears to be an agreement between the master and Messrs. Binny & Co. It begins by reciting all the facts I have already mentioned, including the advance of money by Messrs. Binny & Co., and then states stipulations, or, as they are called, conditions, to be performed on the part of the master. 1st. That the vessel shall be consigned to Messrs. Jardine & Co., of Calcutta. 2nd. That the master shall draw a bill upon them in favour of Binny & Co. for 15,000 rupees, payable at thirty days' sight. 3rd. That the master shall repay to Messrs. Binny & Co., or their agents, all such monies paid or disbursed by them, by way of premiums, for effecting insurance on the ship from Madras to Calcutta, and until the ship shall take her departure from Calcutta on some outward voyage, with interest at 9 per cent. up to the time of repayment. This stipulation or condition introduces the consideration of the main question, namely, whether this bond or agreement contains any sea risk. 4th. That the master shall hypothecate the ship for the due payment of the bill of exchange for 15,000 rupees, and of the other sums and interest aforesaid.

Does it contain
any sea risk ?

Sea risk may be
inferred by
clear implication.

The insurance
of the ship to
be made by
lenders, and
paid for by
borrowers,
standing alone,
might not pre-
judice the
bond.

But such in-
surance, beyond
the termination
of the voyage,
negatives sea
risk.

Common inter-
est only being
required con-
firms this.

There can be no doubt as to the law. There must be a maritime risk in the instrument; it matters not in what form of words. Then the question is, whether I can extract from these conditions any expressed intention of the parties that they purported to agree that there should be a maritime risk. Now, first, it is quite clear that there is no maritime risk directly stated. Secondly, I agree that if there were a maritime risk directly stated, the mere fact that the insurance was to be made by the lenders and paid for by the borrowers might not invalidate the bond. There is one case to that effect, I doubt if there be more, and there the circumstances were most peculiar. I refer to the case of the *Nelson* (a); the objection was taken there, but was not noticed in the judgment. Thirdly. The insurance is not limited to the arrival of the ship at Calcutta, but is continued until the ship leaves Calcutta. This stipulation appears to me to negative all maritime risk on the voyage from Madras to Calcutta, and to show clearly that the parties contemplated a transaction of a different description. This construction is confirmed by the rate of interest, which is the common rate of interest, as I believe, in that part of the world, and not according to the rate where maritime risk is run; and, moreover, the interest is to be

(a) 1 Hagg. A. R. 176.

continued until payment. The intention, and so, I think, the true interpretation of this instrument, is to mortgage the ship for principal, ordinary interest and insurance, without any sea risk at all. It is clear that the Court of Admiralty has no cognizance over such a transaction

1859.
April 6.

This instrument then states the actual advance by Binny & Co., and the drawing of the bill of exchange for 15,000 rupees on Jardine & Co. at thirty days' sight; and then states the agreement of the master, that within thirty-four days after the arrival of the ship at Calcutta he will pay the bill for 15,000 rupees and all interest, and perform the other conditions already recited. But not a word is said of maritime interest or maritime risk. True it is that in some cases the undertaking to pay at a certain time after the arrival of a ship at a port of destination may show an intention to include a maritime risk; but the Court must look at the whole instrument, and form its conclusion from a consideration of all its contents. I might add, that there is not the least intimation here that the bill of exchange was given as a collateral security.

The agreement to pay the bill of exchange thirty-four days after arrival, does not *per se* show sea risk.

The Court will judge the whole of the instrument.

It is not necessary to travel further into the particulars of this case. I found my judgment on the instrument itself, but I am of opinion that there are other difficulties, though I abstain from noticing them with any minuteness. For instance, that no proceedings on this bond were had at Calcutta; indeed there hardly could have been any, as the bond specifies a further voyage. All this negatives a maritime risk between Madras and Calcutta. It has not been contended that the maritime risk extended to the whole voyage. Indeed another and a different security was, by the indenture of the 18th of May, 1858, taken for this sum of 15,000 rupees, which again shows that the money was not due on bottomry at Madras. I pronounce against the bond.

Bond pronounced against.

Dyke, proctor for the bondholders.

Nicholl for the mortgagees in possession.



1859.

May 6.

THE WEST FRIESLAND.

3 & 4 Vict. c. 65, s. 6—Necessaries for several Voyages supplied by Agent and Part-Owner of Ship—Lien after Purchase.

Coals supplied at intervals to a foreign steamer for several voyages may be recovered as necessities.

The agent for a foreign ship, being also part-owner, may recover against the ship for necessities supplied.

The lien on ship for necessities supplied continues, notwithstanding the sale of the ship, if there has been no laches in forcing the lien.

S. B. & Co., of London, the plaintiffs, supplied coals for several voyages, in the summer of 1856, to a steamer trading between Kampen, in Holland, and London: they were the agents of the vessel, and B. was a part-owner. Shortly afterwards the steamer discontinued coming to London, and in 1857 she was sold by auction at Amsterdam. In 1858, S. B. & Co. discovered the vessel in the port of Hull and arrested her:—*Held*, that they were intitled to recover under 3 & 4 Vict. c. 65, s. 6, as for "necessaries supplied to a foreign ship."

THIS was a cause of necessities, brought by Messrs. Sack, Bremer & Co., of London, against the Dutch steamship West Friesland. An appearance and bail was given by the owners Messrs. Gebroeder Van Hasselt, of Kampen, in Holland.

In 1856 the West Friesland was engaged in making passages between the port of Kampen, in Holland, and the port of London, with cargoes of general merchandize. Messrs. Sack, Bremer & Co., the plaintiffs, were the agents and brokers of the ship in London, and Mr. Bremer, a member of that firm, was a part-owner of the vessel. The plaintiffs, as agents, received the freights payable in London, and out of the proceeds paid all outgoings. Between 20th of June and 4th of August, 1856, they supplied to the steamer on six different occasions by order of the master coals for six voyages, to the amount altogether of 222*l.* 15*s.* 6*d.* Shortly after the last supply of coals, the steamer discontinued making passages between Kampen and London, and the account between the plaintiffs and the owners of the ship was closed, leaving a balance in favour of the plaintiffs of 195*l.* 8*s.* 7*d.* In 1857 the vessel was sold by auction in Amsterdam to the defendants, who had previously been the agents for the vessel at Kampen. In 1858 the plaintiffs discovered the steamer under the name of The Twentje, lying in the port of Hull, and arrested her. They now claimed the balance of 195*l.* 8*s.* 7*d.*

Spinks for the Defendants (being called upon to begin).

These were not necessities within the meaning of the statute, 1859.
3 & 4 Vict. c. 65, s. 6; they were not supplied in a season May 5.
of exigency, but for voyage after voyage, in order to enable the
ship to earn profits in the ordinary way. In the case of *The*
Ocean (a), the Court set its face against any such supplies being
considered "necessaries." Secondly, the persons supplying the
necessaries were the regular agents of the ship; they received
the freights on behalf of the ship; they have not sworn that
they gave credit to the ship; and the presumption must be the
other way. One of the plaintiffs was also part-owner. Thirdly,
to admit a claim like the present, would be to admit a secret lien
against which a purchaser would have no protection.

Addams, Q.C., and *Twiss*, Q.C., for the Plaintiffs.

The coals were "necessaries" to the ship; without them she
would have been useless, and have been compelled to lie by the
wall. It matters not that the party supplying was agent to the
ship: it is well settled law that a ship's agent may even take a
bottomry bond. The case of the *Bold Buccleugh* (b) is con-
clusive, that a *bonâ fide* purchaser of a ship takes subject to
existing liens.

DR. LUSHINGTON:—Three objections have been taken to this Judgment.
claim. First, that the coals, as supplied, were not necessities;
secondly, that the plaintiffs were agents of the ship, and one of
them a part-owner; thirdly, that the lien became extinguished
by the sale, inasmuch as the Court does not tolerate secret liens.
As to the statute, the words used are "necessaries supplied."
I am aware that the main reason for passing the Act was to enable
foreign vessels in distress off the coast to obtain the necessary
articles to enable them to keep the sea, but it may well be that
the Legislature intentionally used terms beyond the original
grievance to be remedied, and at any rate I have to construe
the terms as they stand. The coals that were supplied by
Messrs. Sack, Bremer & Co., were, I think, "necessaries" to the
steamer; without them, the steamer could not have left the port
of London. The case of *The Ocean* was different; there the
goods supplied were to a vessel when building. As to the
second objection, that the plaintiffs were agents of the ship,
there is nothing in the Act to exclude agents from suing, and
nothing in the relation itself, apart from positive law, as is clearly
illustrated by the Continental law. That Mr. Bremer was him-
self a part-owner, is only a technical objection. At Common

The coals were
"necessaries."

The plaintiffs
are not exclu-
ded from suing,
as being agents,
or because one
of them was
part-owner.

(a) 4 N. of C. 31.

(b) *Harmer v. Bell*, 7 Moore, P. C. 281.

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May 6.

The purchaser
of a ship takes
subject to liens.

Claim pro-
nounced for.

Law partner cannot sue partner, but that is a rule that does not obtain in this Court; and here the property is sued and not the copartner. As to the third point, the law is, that the purchaser of a ship takes subject to liens, and has his remedy over against the vendor. If there had been any laches, any undue delay in enforcing the lien, the Court would have looked unfavourably upon the lien, being always anxious to protect the purchaser, but Messrs. Sack, Bremer & Co., seem to have put their lien in force at the first opportunity. I pronounce for the claim, and direct the amount to be referred to the Registrar and merchants.

Clarkson, proctor for the Plaintiffs.

Coote, proctor for the Defendants.

In the Privy Council.

Present—The Right Hon. Lord CRANWORTH.
The Right Hon. Lord CHELMSFORD.
The Right Hon. Lord KINGSDOWN.
The Right Hon. Sir EDWARD RYAN.

THE WEST FRIESLAND.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

3 & 4 Vict. c. 65, s. 6—*Necessaries—Estoppel by Accounts—
Reference of Amount to Registrar.*

An agent appropriating, in his accounts with his principal, sums received to the payment of specific items, is estopped from disputing the payment of those items.

Where, therefore, the agents of a foreign ship furnished coals to the ship on several voyages, and the accounts for the several voyages were balanced and settled, they are estopped from appropriating the receipts to a previous agency account for the ship, and suing the ship for the coals as necessaries supplied and unpaid for.

Where a ship is arrested for a specific demand, the amount cannot be referred to the Registrar, unless it appears that something, in any event, is due.

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THE preceding judgment of the Court of Admiralty was appealed by Messrs. Van Hasselt & Co.; and it was urged on their behalf, as appears more fully in the ensuing judgment,

that the accounts rendered by Sack, Bremer & Co. showed that the coals supplied had been paid, and that the action was really to recover against the ship the balance of a previous agency account for the ship with the former owners. 1860.
February 16.

Spinks for the Appellants.

Twiss, Q.C., and *Clarkson* for the Respondents.

The Right Hon. Lord CHELMSFORD :—This is an appeal from Judgment. the decree of the Judge of the High Court of Admiralty, pronouncing for the claim of the Respondents for necessities supplied to the steamship *Twentje*, and referring the accounts to the Registrar and merchants.

The material facts which appear upon the proceedings, consisting of the act on petition, an answer, and a reply, and upon the proofs in the case, are the following :—

In the year 1856, the steamship *Twentje*, then called the West Friesland, belonging to the port of Kampen, in Holland, was owned by several persons, one of whom was Mr. M. F. Bremer, a partner in the firm of Sack, Bremer & Co., the Respondents, and was engaged in trading voyages between Kampen and London. Sack, Bremer & Co. were the sole agents and brokers of the ship at the port of London, and the Appellants, Messrs. Van Hasselt, were the sole managers for the owners at the port of Kampen. The Respondents, while acting as such agents, received the freights payable in London, and out of the proceeds paid the expenses incurred by the ship in England, and from time to time made out accounts, in which they placed the sums so paid and received respectively to the debit and credit of each successive voyage, and sent these accounts to the Appellants, as the managers of the ship. Upon six of the voyages, between the 20th of June and 4th of August, 1856, coals, necessary for the navigation, were supplied to the ship by coal merchants, upon orders given by the Respondents, as agents, and in their accounts with the owners, furnished after each of these supplies, and made out in the manner above described, and transmitted to the Appellants, the Respondents debited the voyage with the price of the coals so supplied. In four of these accounts there was a balance in favour of the Respondents; in two of them the balance was in favour of the Appellants: the result of the whole of the six accounts being a small balance of 1*l.* 4*s.* 6*d.* against the Appellants. In the year 1858 the ship was sold by

Facts of the case.

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public auction at Amsterdam, and purchased by the Appellants, and her name was changed from the West Friesland to the Twentje. In the month of November, 1858, the Respondents, having learnt that the ship had arrived within the jurisdiction of the Court, and was at the port of Hull, caused her to be arrested in this suit. Their claim was alleged to be for 195*l.* 8*s.* 7*d.*, the balance due to them for the coals supplied to the ship for the above-mentioned six voyages. They arrived at this balance by taking the whole of their agency accounts with the owners during the years 1854, 1855 and 1856, down to the time when they ceased to be agents, and, by excluding all the items in respect of the coals, there appeared to be a balance for the voyages above referred to, in favour of the owners, of 27*l.* 6*s.* 11*d.* This balance they deducted from the sum of 225*l.* 15*s.* 6*d.*, the total amount payable for the coals, and proceeded for the remainder against the ship.

The learned Judge decided that the Respondents were intitled to have recourse to the ship to obtain satisfaction of this demand, and directed the usual reference of the accounts.

This judgment has been appealed from upon three grounds:—

1st. That the Respondents had no claim at all upon the ship, but that their only remedy was against the owners, to whom they were agents at the time when the coals were supplied.

2nd. That they had no right after the delivery of accounts, in which they specifically appropriated the sums which they received, to extract the items relating to the coals in order to obtain a distinct subject of charge upon the ship. And

3rd. That even if they had been intitled originally to proceed in this manner against the ship, they had lost their remedy by her having passed into the hands of a *bonâ fide* purchaser without notice.

Very important questions of law have been raised upon each of these grounds of appeal, but their Lordships consider it unnecessary to express any opinion upon them, as, independently of all questions of law, it appears to them that there was no evidence of facts to justify the order in this case.

Where a ship is arrested on a specific demand, the amount cannot be referred to the Registrar, unless it ap-

The order pronounces absolutely for the claim of the Respondents "with costs," and refers the claim to the Registrar "to report the amount thereof."

This order does not leave it open to the Appellants to show

that "nothing whatever is due for supplies made by the Respondents to the ship," as the Respondents, in their case, assert that it does.

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pears that something, at all events, is due.

When a ship is arrested on a specific demand, before a reference of the accounts can be directed, it ought at least to be shown to the Court that at all events something is due, although the actual amount may properly be the subject of inquiry. It is not like a bill in equity on an unsettled account, where the Court directs the account, leaving it to be shown by the result on which side the balance lies.

Now, the evidence in this case, if closely examined, seems to establish that at the time of the arrest of the ship nothing could have been due for the supplies of the coals in question, but, at all events, it fails altogether to show that anything was then due; for the trifling balance of *1l. 4s. 6d.* must, for the purpose of this suit, be considered to be the same as if nothing at all had been due upon them. The demand is stated to be for six parcels of coals supplied to the ship on six different occasions in the months of June, July and August, 1856.

The answer to this demand is, that the Respondents were the agents of the ship in this country; that in that character they received the freight, and made payments, and furnished supplies in this country on the credit of the captain and owners of the ship; that the six supplies of coals were made in the course of six separate voyages, and were included in accounts made out by the Respondents, and sent to the Appellants as managers for the owners, of the result of each of those voyages on which the receipts were credited on the one hand, and the payments, including the supplies of coals, were charged on the other; and on the whole of these six accounts the small balance of *1l. 4s. 6d.* was due to the Respondents. The Appellants distinctly swear that these accounts were sent to them as the agents of the owners, in Holland, and that they settled their accounts with the owners on the footing of the accounts thus rendered by the Respondents; the Respondents, therefore, had credit for, and have been satisfied in respect of, all the sums charged in these accounts. Now the Respondents nowhere deny that these accounts were rendered by them; they say, indeed, that they were only statements or accounts of sums received, or to be received, and of disbursements made or to be made, and that they were never

The Respondents, having once appropriated in their accounts monies actually received to the payment of the specific items, cannot afterwards appropriate them to the liquidation of a previous account current.

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settled and adjusted between them and the owners of the ship; but they do not deny that the accounts contain an accurate statement, or that the sums charged and credited in these accounts were actually received and paid. What they allege in support of their claim is, that they were agents for the ship in England, not merely at the times in question, but through the years 1854, 1855 and 1856, and that when they ceased to be agents, on balancing the sums actually received by them on account of the ship against the disbursements and supplies actually made by them on account of and to the ship (six of such supplies being for coals, made by them to the ship, amounting in value to the sum of 225*l.* 15*s.* 6*d.*), there remained due and owing to them the sum of 195*l.* 8*s.* 7*d.*; their receipts on account of the ship (exclusive of such supplies) exceeding their disbursements by the sum of 27*l.* 6*s.* 11*d.*, which latter sum they accordingly place to the credit of the owners. The case of the Respondents depends entirely upon their right to deal with the accounts in this manner. They say, in effect, that on taking an account, according to their own view, of all their dealings and transactions with the owners of the ship, they find a balance in their favour of 195*l.* 8*s.* 7*d.*, and that, in order to obtain a charge on the ship, they are intitled to select from the accounts the items which consist of charges for coals, and to attribute the balance specifically to those items. They thus propose to treat the sums received in respect of the six voyages, not as received on account of the disbursements made for each successive voyage, which would be the fair inference from the accounts then rendered, but as payments made in liquidation of a balance due on a previous account current. But there is no principle which can enable the Respondents thus to make the supplies of coals a distinct and separate account.

Their Lordships are therefore of opinion, upon the facts, that the arrest of the ship by the Respondents for a general balance of accounts was unjustifiable, and that their claim cannot be supported. They have, therefore, agreed to recommend to her Majesty to reverse the order appealed from, and to allow the appeal with costs.

Judgment reversed with costs.

Coote, proctor for the Appellants.

Clarkson for the Respondents.



1859.
May 12.

In the High Court of Admiralty.

THE SCHWALBE.

Collision—Exceptive Allegation—Practice.

In a cause of collision, an exceptive allegation, and the examination of witnesses thereon, will be suspended until the evidence in the principal cause is printed.

THIS was a cause of collision ; and during the examination of the witnesses upon the libel and the allegation, an exceptive allegation to the testimony of a witness had been brought in.

Addams, Q.C., now moved to suspend the exceptive allegation and the examination of witnesses thereon until after the printing of the evidence in the principal cause.

Wamhey, contra.—The affidavits show that the witnesses are about to leave the country immediately. The application also is too late, according to the rule of the new practice, 31st December, 1855 :—“ Upon any libel or allegation being given in, an assignation shall be made upon the adverse proctor to bring in his responsive allegation thereto on some day to be then fixed by the Judge or Surrogate; and the libel or allegation so given in shall stand admitted, unless the adverse proctor shall, within four days from the giving in of the same, declare in Acts of Court that he opposes the admissibility thereof.”

DR. LUSHINGTON :—With regard to the practice of the Court Judgment. in exceptive allegations in causes of collision, I believe no series of precedents can be found : so far as I remember, there have been hardly more than two in the course of thirty years. The Court will be loth to follow the rules formerly followed in the Court of Arches and other Courts, as the Court, though compelled to receive exceptive allegations and to give effect to them, if duly substantiated, the Court cannot but view them with jealousy, as opposed to the common process of justice. In the present case it does not appear that all the witnesses have yet been examined, which would be a fatal objection to any further immediate proceeding on the exceptive allegation ; but, even if this were otherwise, I should decide as I now do, that all proceeding upon the

Exceptive allegations to be viewed with jealousy.

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exceptive allegation be suspended until the evidence in the principal cause is printed, and the Court is fully possessed of all the circumstances of the case, so as to decide whether an exceptive allegation is admissible.

THE ARGO, BENSON, *Master*.

*Collision in narrow Channel—Steamer in charge of Pilot—
Starboard side of Fairway—Province of Pilot and Master—
Trim of Ship—17 & 18 Vict. c. 104, ss. 297, 388.*

The pilot has sole charge of the navigation of a ship; if he takes a steam vessel to the port side of a narrow channel, contrary to the 297th section of the Merchant Shipping Act, 1854, the master is not bound to interfere, and the owners are not responsible for damage caused thereby.

The trim of a ship is within the province of the master; if, therefore, a ship is not in ordinary safe trim, and a collision is in any degree occasioned thereby, the owners are liable, notwithstanding a licensed pilot is in charge of the ship.

But if a ship is in ordinary safe trim, the owners are not liable, although the ship might have been in handier trim, and although the trim of the ship in part contributed to the collision.

May 13.

THIS was an action of collision, brought by the owners of the British brig *Welthen*, against the steamship *Argo* and her owners, the European and American Steam-Shipping Company, intervening. The collision occurred at 4.15 p.m. of the 7th of November, 1857, in the river Thames, opposite Erith. The *Welthen* was drifting up the river, in about mid-channel, with scarcely steerage way, the wind being very light, and the tide flood. The *Argo* was going down the river at half-speed, in charge of a licensed pilot. In consequence of many vessels being anchored on the south side of the river, and many others drifting with the tide, it became, according to her statement, dangerous to keep to the south of mid-channel, and the *Argo* was therefore, by direction of the pilot, kept rather over to the north side. The *Welthen* being observed ahead, driving athwart the river, with her head to the Essex shore, the pilot ordered the helm of the *Argo* to be put astarboard; but finding the force of the tide prevented the steamer from clearing the *Welthen* ahead, he then ordered the helm to be put hard aport, and the engines to be stopped and reversed, in order to go under her stern. These orders were executed, but the *Argo* nevertheless struck the

Welthen a sliding blow on her port quarter, and upset a boat astern, whereby two men were drowned. The owners of the Argo pleaded—1. That the collision was an inevitable accident caused by the strength of the tide. 2. That the collision was the act of the pilot only, for which the owners were not responsible. In the evidence of the pilot, it also appeared that the Argo was at the time in ballast, and rather down by the head, which prevented her answering her port helm so rapidly as she would otherwise have done.

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May 13.

Addams, Q.C., and Twiss, Q.C., for the Welthen.

The proof that it was dangerous to keep to the south shore is insufficient. If so, the owners of the Argo are responsible, because it was the duty of the master to have interfered with the pilot, to prevent the Act of Parliament being violated. The owners are also liable for having their vessel in an improper trim, which conduced to the accident.

The Queen's Advocate and Spinks for the Argo.

This was an inevitable accident. The pilot was warranted by danger in departing from the strict rule of the Act of Parliament. The pilot only was responsible for the navigation of the ship; it was not for the master to question the opinion of the pilot as to what was dangerous or not. The vessel may not have been in the handiest trim possible, but that is not required; she is only required to be in ordinary safe trim, and she was in that condition.

Addams, Q.C., in reply.

The Right Hon. DR. LUSHINGTON, to the Elder Brethren:—The facts of this case are, that the Argo, a large steamer, going down the river Thames in broad daylight, thinks fit to keep to the north side of the mid-channel, and runs into the Welthen brig, which was drifting with the tide without steerage way. The defence is—1, That the collision was an inevitable accident; 2, That it was caused by the act of the pilot alone. I think it is impossible to say that the collision was an inevitable accident, an accident which could not have been avoided by ordinary care and skill. The brig was seen in ample time to have been avoided, and the tide or current was not such that the steamer was out of command. The next question is, whether there was justifiable cause for departing from the rule of the Act of Par-

Collision not
an inevitable
accident.

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May 18.

No sufficient cause proved for departing from the statutory rule.

The master however was not bound to interfere, and prevent the pilot taking the ship to the port side of the mid-channel.

The trim of the ship is in the province of the master: owners are bound to navigate their vessel in ordinary safe trim.

liament, which directs a steamer to keep to the starboard side of the mid-channel, where safe and practicable. Unless you are satisfied that it was neither safe or practicable for this steamer to have kept to the south of the channel, the Act of Parliament has been violated. The inclination of my own mind upon the evidence is, that the circumstances proved do not establish any justification for departing from the rule of the statute. It has been argued, however, that supposing this to have been the case, the master ought to have interfered. That is a matter which must always be treated with great caution. I have said on many occasions, and my ruling has been confirmed by the Judicial Committee in the case of *Hammond v. Rogers* (a), that a master has no right to interfere with the pilot, except in cases of the pilot's intoxication or manifest incapacity, or in cases of danger which the pilot does not foresee, or in cases of great necessity. The master of the *Argo* says, "It is not my province to take notice of the course of the ship, or on what shore she is navigating. She may be taken here or taken there, while she is in charge of the pilot, without my knowing the cause; there may be reason under water why the pilot does it. All my duty is, to take care that all the pilot's orders are promptly and properly obeyed;" and I think he says so rightly. The navigation of the ship is taken out of the hands of the master and transferred to the pilot. I am of opinion that the master was not bound to interfere to prevent his vessel being taken by the pilot to the north side of the mid-channel. The only remaining question is, whether the trim of the steamer contributed to the collision, and whether the owners are on that account liable for the damage. The only evidence to show that the steamer was in faulty trim, is that of the pilot, who deposed before the coroner, with the fear of a prosecution for manslaughter hanging over his head; no doubt he was strongly actuated by a desire to acquit himself of all culpability. You must form your own opinion to what extent the steamer was out of trim, and whether it contributed to the collision. If she was out of ordinary safe trim, so that she was carried by the force of the tide or current more than a ship in ordinary safe trim would have been, and this helped to bring about the collision, the owners are responsible for the damage, the trim of the ship being within the province of the master; but if she was in ordinary safe trim, then, although she might have been in handier trim, and although the trim of the ship in part contributed to the collision, they are not responsible.

(a) 7 Moore, P. C. 171.

DR. LUSHINGTON, on returning from consultation with the Elder Brethren :—

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We are of opinion that the pilot of the Argo was solely to blame for the collision, and that the trim of the steamer was the ordinary trim, and did not contribute to the collision. I shall therefore dismiss the Argo, but as usual in cases of this kind, without costs.

Pilot of the
Argo alone to
blame.

Clarkson, proctor for the Welthen.

Pritchard for the Argo.



THE CALLA, — TREBLE, *Master*.

*Collision—Coloured Lights—Admiralty Regulations, 1858—
Onus Probandi.*

In a cause of collision, if the collision was caused by one of the vessels not having carried a coloured light fixed, as required by the Admiralty Regulation, 1858, the owners will be found to blame, unless they prove that, in the circumstances, it was impracticable to observe the rule.

COLLISION. Both vessels were British ships. The collision took place on the night of the 27th January, 1859. The Calla pleaded that, owing to the wind being a heavy gale, and to a strong sea frequently breaking over the vessel, it was found to be impracticable to keep her green and red lamps fixed as appointed by the Admiralty regulation, but that the said lamps were kept lighted on deck ready for instantaneous exhibition when required ; and that on the Dora (the vessel proceeding in the cause) being descried on the port bow the red light was immediately shown over the side. The other facts of the collision it is not necessary, for the purpose of this report, to specify.

June 11.

Jenner, Q.C., and *Spinks* for the Dora.

Addams, Q.C., and *Twiss*, Q.C., for the Calla.

The learned Judge, in summing up to the Elder Brethren, said that the Calla, not having carried her coloured lights fixed in

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June 11.

the ordinary manner required by the Admiralty regulation, was bound to make out a sufficient justification; and that if they were of opinion that no circumstances were proved sufficient to justify non-observance of the rule, and that the collision was in any degree occasioned by the lights not being exhibited as required, the Calla would be to blame for the collision.

The Elder Brethren found that the Calla had not proved that it was impracticable to carry her coloured lights fixed, that the collision was caused by her default in not exhibiting her light in proper time, and that no blame was attributable to the Dora.

Damage pronounced for.

The learned Judge then pronounced for the damage.

Toller, proctor for the Dora.

Clarkson for the Calla.



THE NORTH AMERICAN, — CLARKE, *Master*.

Collision—Decree, both Vessels to blame—Practice—Detention Fees.

Where, in an action of collision, a decree has been made of both vessels to blame, the Court will not refer the damage of both vessels to the Registrar, but will leave the defendant to his cross-action, notwithstanding that the ship of the plaintiff perished in the collision, and the plaintiff resides out of the jurisdiction.

Where a vessel is arrested in an outport, and not by the marshal of the Court, the detention fees are to be paid by the arresting party, though successful in the cause.

June 17.

ON the 18th of March, 1858, the North American was arrested at Liverpool, in an action of collision, by an agent of the owners of the Spanish barque Tecla Carmen. She continued under arrest during the trial of the cause until 5th of February, 1859, when bail was given and the arrest superseded. On the 26th of March, a cross-action was entered by the owners of the North American, but the Tecla Carmen having perished in the collision no warrant was issued, and her owners gave no appearance until the 4th of May, 1859. The original cause had meanwhile been tried and appealed, and their Lordships in the Privy Council (a) confirming the judgment of the Court

(a) Ante, p. 358.

below, that both vessels were to blame for the collision, remitted the cause.

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Twiss, Q.C., now moved the Court to order the detention fees to be paid by the owners of the *North American*, and the reference of the amount of damage received by the owners of the *Tecla Carmen* to proceed in the usual course.

[*DR. LUSHINGTON* inquired of the Registrar what was the practice of the Court with respect to detention fees, when a vessel was arrested at an outport. *Registrar*: The universal practice is that the salvors or parties proceeding pay them.]

Deane, Q.C., *contra*.

As to the fees, there is a proper distinction between an arrest by the marshal of the Court, the Court's own officer, and an arrest in an outport by a mere agent of the party arresting. The Court has a hold over its own officer for exacting no more than proper fees, but no hold over any other person. Since the decision of *Cope v. Doherty* (a), the owner of a foreign ship, for safety's sake, leaves his ship in the hands of the party arresting, or of the officer of the Court; and it would be hard indeed if to this hardship another was added, that he must pay all the detention fees. These fees also are of the nature of costs of the party proceeding, like printing.

As to the order for reference. The cross-action has not been heard; the *Tecla Carmen* is sunk; and if the decision as before holds both vessels to blame, the owners of the *North American* will have no means of obtaining the fruit of their judgment.

DR. LUSHINGTON :—The Registrar says, and my own memory goes with him, that the unvarying practice of the Court has been, where the marshal arrests, that he has the security of the ship for his costs; but where the party taking out the warrant executes it himself or by his agent, he is responsible for the detention fees. Perhaps I cannot give any very satisfactory explanation for this difference in our practice in the London district and in the outports. But on mere motion I cannot change the ancient practice of the Court. These detention fees must be paid by the owners of the *Tecla Carmen*.

Judgment.

Party executing warrant in an outport pays the detention fees.

(a) 4 K. & J. 367.

1859.

June 17.

The reference
to proceed in
the ordinary
way.

As to the reference. The cross-action should have been better prosecuted. Although no appearance had been given to the libel, I am of opinion that for such non-appearance a decree could have been got against the owners of the *Tecla Carmen*. The reference must proceed in the ordinary way.

THE *BENGAL*, W. H. HENDERSON, *Master*.

*Master's Wages—Action in Personam and Judgment unsatisfied
—Proof in Bankruptcy—Lien on Ship.*

A master having sued for his wages at common law and recovered judgment, which judgment remains unsatisfied in consequence of the defendant's bankruptcy, and having further proved his debt under the defendant's bankruptcy, is intitled to sue the ship in the Admiralty Court, notwithstanding the ship has changed hands.

June 9.

July 14.

THIS was a suit for wages, brought by William Henry Henderson, late master of the barque *Bengal*; James Akett, formerly of Melbourne, then of New Orleans; Robert M'Swiney, of Melbourne, and John Atteridge, formerly of Melbourne then of Liverpool, her owners, intervening.

The summary petition stated the hiring of Henderson in February, 1854, by Alexander Robinson, her then owner, on a voyage from London to Port Philip; the arrival of the barque at Port Philip on 2nd September, 1854, where Henderson remained in charge of her as master till 2nd January, 1855, for which services he claimed, on balance of account, 74*l.* 4*s.* That some time in October or November, 1854, the barque was sold by Messrs. Tootal and Browne, of Melbourne, under power of attorney from Robinson, to Messrs. White & Co., of Melbourne, of which sale Henderson was not aware till 1st of January, 1855, when he was required to deliver up possession of the barque to Messrs. White. This he, at first, refused to do; but being advised that he could not legally retain possession, there being no Admiralty Court at Port Philip, he delivered her up to Messrs. White. That he demanded his wages from Tootal and Browne, as agents of Alexander, who paid 5*l.* on account, and gave him the following letter to Robinson:—

DEAR SIR,

Melbourne, 19th January, 1855.

1859.

*June 9.**July 14.*

LATE owner of the barque Bengal. This will be presented by Captain W. H. Henderson, late master of the barque Bengal, and will certify that, in consequence of the balance of funds, the proceeds of sale of the above barque having been attached in our hands to meet a claim for deficient delivery of wooden houses, we have been prevented by the Court paying Captain Henderson the balance of wages due to him, and amounting to 74*l*.

Yours, &c.

TOOTAL AND BROWNE.

That Henderson also received from Messrs. White 20*l*. on account. That it was not till June, 1856, that he was able to leave for England, and he then made the voyage as mate of a vessel, and arrived in London 20th November, 1856, when he handed Messrs. Tootal and Browne's letter to Robinson, who promised to pay when he received remittances on account of the barque. That about 28th May, 1857, Robinson was, on his own petition, adjudged a bankrupt; that his estate was insolvent, and the trade assignee had refused to pay Henderson's wages; that from November, 1856, till February, 1859, Henderson had been unable to discover the said barque.

This petition was answered by an allegation on behalf of Alett, M'Swiney and Atteridge, stating their purchase of the vessel in the beginning of 1855, from Messrs. White, at Melbourne. That in the early part of 1857 Henderson brought an action in the Court of Exchequer, for the same wages, against Robinson, and obtained judgment by default on the 1st May, 1857, for the sum of 74*l*. and costs. That on 14th September, 1857, he filed his claim in bankruptcy against Robinson's estate, setting forth his action and judgment recovered as above. That the Bengal arrived at Montrose with a cargo in March, 1856, and had since then been employed between England and North America in the timber trade, and had on various occasions been in the ports of London and Shields, where Henderson might easily have arrested her at an earlier period. That the cause of action was the same as in the action and judgment recovered in the Court of Exchequer. That by reason of that action and judgment, and by reason of his *laches* and delay, and of the other premises, it was not competent in law to Henderson to recover the said wages against the Bengal, her present owners or the bail given, &c.

On the 9th June *Wambey* moved to oppose the admission of the allegation.

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A maritime lien attaches to the ship and follows the ship into a purchaser's hands; *Harmer v. Bell* (a). The unsatisfied judgment *in personam* is no bar to a plaintiff suing *in rem*; a personal suit pending has been expressly decided to be no bar; *Harmer v. Bell* (b). The master has been guilty of no *laches* so as to forfeit his lien. The Court is always anxious to satisfy just claims of wages; *Sydney Cove* (c); *Margaret* (d); *Repulse* (e).

Swabey in support of the owners' allegation.

The judgment in the Court of Exchequer is a bar to proceeding for the same cause *in rem*: the cause is *res judicata*; *King v. Hoare* (f). Even if it were a case of *lis alibi pendens* only, that would be a bar; *Lanarkshire* (g). The master has lost his lien by his delay; *Harmer v. Bell* (h); *Royal Arch* (i).

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DR. LUSHINGTON:—In the allegation it is not pleaded that the purchasers were ignorant of the present demand, or that they made inquiries as to the existence of such a lien. This was a British ship sold in Australia; that fact, and the smallness of the sum, ought to have excited the attention and suspicion of the purchasers. Several facts are quite apparent; 1st, that these wages are a debt justly due to the master; 2ndly, that he is not barred by the Statute of Limitations; 3rdly, that he has obtained a judgment in a Court of Common Law against a bankrupt defendant, which judgment remains unsatisfied. The question, then, is, whether this master, having by law a twofold security for his wages, may avail himself of the second, the first which he tried (the personal action) having practically failed to give relief. I know of no case immediately in point either as regards master or seamen; but I see no reason to doubt but that this suit ought to be allowed to proceed. So, when a mortgage and a collateral security along with it is taken, the creditor may proceed on either, and a Court of Equity will take care that he does not recover more than he is justly entitled to; *Burnell v. Martin* (k). I must reject this allegation.

The personal action proving fruitless, the master may sue *in rem*.

Allegation rejected.

Scurlock, proctor for the master.

Jennings and Son for the owners.

(a) 7 Moore, P. C. 281.

(b) 7 Moore, P. C. 286.

(c) 2 Dods. 13.

(d) 3 Hagg. 240.

(e) 4 N. of C. 172.

(f) 13 M. & W. 504.

(g) 2 Spinks, 189.

(h) 7 Moore, P. C. 285.

(i) Ante, p. 284.

(k) Doug. 417.

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THE JOHN AND MARY.

Collision—Action in Personam—Verdict unsatisfied—Ship liable in Court of Admiralty—Lis alibi pendens.

A plaintiff, having sued in a cause of collision at common law and recovered a verdict, is intitled, if the defendant proves insolvent, to sue the ship in the Court of Admiralty, even after the ship has been transferred to a third party.

Seemle. A party, having commenced proceedings at common law in respect of a collision, will not be allowed, in the first instance, to sue the ship in the Admiralty Court for the same cause.

IN this case the John and Mary was arrested on behalf of the owners of the screw steamship Urania, in a cause of damage. The proctor for the owners of the John and Mary prayed to be heard on his act on petition in objection to the arrest, and in bar to any further proceedings.

The act on petition stated that the collision from which the damage arose took place on the 28th of November, 1858; that from that date till the 19th of February, 1859, R. Watson and Isabella M. Husdell were the registered owners of the John and Mary. That on the 10th day of December, 1858, an action was commenced in the Court of Exchequer, on behalf of the owners of the Urania, the promoters of the present suit, against Watson and Husdell, as owners of the John and Mary, to recover damages in respect of the said collision. That the said action was tried at the assizes at Norwich on the 30th of March, 1859, and a verdict was given for the plaintiffs in a sum of 108*l.*, by way of damages. That on the 16th of February, 1859, Watson and Husdell, being in insolvent circumstances, transferred by bill of sale the John and Mary to Austin, Allison and Robson, the defendants in the present suit, to hold the same for the benefit of the creditors of Watson and Husdell; that on the 19th of February Austin, Allison and Robson, were registered as sole owners, and that the plaintiffs in the present suit were well aware of the transfer, and that the transfer was for the benefit of all the creditors of Watson and Husdell. That the Court of Exchequer was a Court of competent jurisdiction to try the question at issue between the owners of the respective ships. That by reason of the action brought the Court of Exchequer had obtained jurisdiction over the parties; that, therefore, and by the verdict given at Norwich, the whole matter became *res judicata*, and that it was not competent to the owners of the

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Urania to proceed in this Court against the present owners of the John and Mary in respect of the said collision.

The answer on behalf of the owners of the Urania, stated that the John and Mary was arrested at Sunderland on the 18th of April, 1859; an appearance entered to the arrest; and on the 23rd of April bail given, and the brig released; denied the effect ascribed to the verdict given on the 30th of March at Norwich, in the action brought by the owners of the Urania against Watson and Husdell, or that it was incompetent to the owners of the Urania to proceed against the John and Mary, her present owners, and the bail given, &c., because the damages recovered in the said action, and awarded by the said verdict, had never been paid, because the judgment was not satisfied, and the parties to the action were not the same as the parties to the present suit.

The *Admiralty Advocate* and *Tristram*, for the John and Mary.

The verdict in the Court of Exchequer makes this a *res judicata*; the cause is the same, and if the ship had not been transferred, the persons would have been the same, and the transfer cannot create a liability; the case is therefore fairly within the rule given in the notes to the *Duchess of Kingston's Case* (a). The following cases also show that where a person has elected one remedy against another person, he cannot afterwards resort to another remedy against the same person, even though the first remedy may have been ineffectual; *William Money* (b); *Kalmazoo* (c); *Pearson v. Gamon* (d); *Myddelton v. Rushout* (e). They rest upon the principle "Nemo debet bis vexari pro eâdem causâ." The attempt in this case, where the defendants are really trustees of the former owners for the benefit of their creditors, is to give preference to one creditor over the rest.

Deane, Q.C., and *Swabey*, for the owners of the Urania.

The cases of *Burnell v. Martin* (f), and *Harmer v. Bell* (g), and the decision of the Court just pronounced in the *Bengal* (h), show that the lien on the ship is not lost by an ineffectual action *in personam*. There can be no difference in this respect between a lien arising out of contract and a lien arising out of tort.

(a) 2 Smith, L. C. 619.

(b) 2 Hagg. 136.

(c) 15 Jurist, 885.

(d) 2 Lee, 268.

(e) 1 Phill. 247.

(f) Doug. 417.

(g) 7 Moore, P. C. 281.

(h) Ante, p. 468.

DR. LUSHINGTON:—The only difference between this and the preceding case is, that the right of action here arises out of a collision. It is open to any person who has received damage by a collision to recover at common law, or to avail himself of his lien on the ship which he asserts has injured him. In this case the plaintiff has recovered judgment in an action at common law, but is unable to obtain the results of that judgment, owing to the insolvency of the defendants to that action. Cases of *lis alibi pendens* have nothing to do with such a state of circumstances. I certainly should not allow, while an action was pending at common law on precisely the same grounds, a suit to be prosecuted here at the same time, because in the action originally commenced, full indemnity for the injury received might be obtained, but where that proves not to be the case, I think the suit in this Court ought to be allowed. I must dismiss this petition with costs, and the plaintiffs may proceed in the cause.

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The plaintiffs having failed to realize their judgment at common law, are intitled to sue the ship.

Petition dismissed with costs.

Shepherd and Shipwith, proctors for the plaintiffs.

Coote for the defendants.

THE RAJAH OF COCHIN.

Bottomry—Item of Master's Wages—Jurisdiction of Colonial Vice-Admiralty Court—17 & 18 Vict. c. 104, ss. 191, 209—Right of Master to sue for Wages on leaving Ship abroad by Necessity.

The Merchant Shipping Act, 1854, applies to the colonies; and by the 191st section, a master has a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony.

The 209th section is an additional provision in favour of the seaman, and does not affect the right of the master.

A master, being compelled by pressing necessity of ill health to leave his ship abroad, is intitled to sue immediately for wages.

An item of master's wages, paid under such circumstances, allowed under a bottomry bond.

The owner, disputing the amount of such wages, is bound to show that it was improper.

THIS was an objection to the report of the Registrar and merchants in a cause of bottomry. The facts appear in the judgment.

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The *Queen's Advocate* and *Twiss*, Q.C., in objection to the report.

Wambey in support of it.

Judgment.

Facts of the case.

DR. LUSHINGTON :—This question arises under the following circumstances :—This ship, the *Rajah of Cochin*, was proceeding from Akyab, in the East Indies, to the port of Corfu, and in the prosecution of that voyage she met with some misfortunes at sea, and was under the necessity of putting into Port Louis, in Mauritius, in order to be repaired. The master at the time of her arrival there was in a very ill state of health, and it is proved to the satisfaction of the Court was so ill as to be justified in then leaving the ship. Upon arriving at Mauritius he appoints Messrs. Wiebe & Co. to be the agents of the ship, and it appears that they advanced to him certain sums, being the amount of the wages which he claimed to be due to him up to the time of his leaving the ship. Large repairs were then done, other sums were advanced, and a bottomry bond was taken by a house passing under the name of Messrs. Arnal, Cayron & Co., who advanced money upon it at the rate of 9*l.* per cent. The ship was then brought to this country and arrested on behalf of the bondholders. The validity of the bond was not contested; but an appearance was given on behalf of the owner of the ship and freight, and he desired a reference to the Registrar and merchants in the ordinary course, to ascertain whether the items which the bond charged were consistent with law or not. The Registrar and merchants took the circumstances into their consideration, and now a dispute arises with respect to a certain item,—the master's wages;—the owner having alleged that this item ought not to have been allowed. The Registrar and merchants were, however, of a contrary opinion, and allowed it. The true question before the Court is, whether the Registrar and merchants were correct in allowing this sum. The Court is not required to enter into their reasons, nor is it absolutely necessary that I should give any distinct opinion upon them, for the question is whether they were right in the conclusion to which they came.

Are the master's wages paid abroad to be allowed as an item in the bottomry bond?

The Court is prayed by the act on petition “to overrule the report of the Registrar, and to refer the same back to him and the merchants by whom he was assisted, for amendment.” I apprehend that prayer must mean, that I should express dissatisfaction with the report, and refer it back to the Registrar and merchants to reduce the sum which has been allowed.

I can put no other construction upon it, because if it was intended to say that the whole sum ought altogether to be disallowed, then it would be for the Court, and not the Registrar and merchants, to determine upon that disallowance. Nevertheless I will enter into the general question.

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The first question is manifestly this—by what law the Court is to decide whether the master had a lien on the ship for wages due? Am I to decide according to the law prevailing in this country, or am I to have reference to the supposed law of the country where the bond was given? I am of opinion that this question admits of no doubt whatever. I am of opinion that, by statute, and for other reasons, the Vice-Admiralty Courts in our colonies, properly constituted, exercise the same jurisdiction as this Court, with one exception, and that is, where particular powers are conferred upon this Court by name, and not upon the Vice-Admiralty Courts (a); and there are instances to that effect. I need not look to the Merchant Shipping Act alone for this position, there is also the 2 Will. 4, c. 51, one special object of which was to obviate doubts as to the jurisdiction of the Vice-Admiralty Courts. I should have no doubt in an ordinary case as to what was the rule of the Vice-Admiralty Courts; but in the particular instance I am now considering I am fortified by the provisions of the Merchant Shipping Act, which apply in direct terms to the Vice-Admiralty Courts, more especially the provisions belonging to a master's wages. The 191st section is as follows:—"Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies, for the recovery of his wages, which by this Act, or by any law or custom, any seaman not being a master has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty, touching the claim of a master to wages, any right, set-off, or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions," and so forth. It appears to me that these words cannot but mean to prescribe for all Vice-Admiralty Courts, without exception, the mode in which they shall proceed in taking cognizance of claims of this description, and to confer upon them jurisdiction for that purpose. I apprehend that was granted to all our colonies, without any exception, whether they had been acquired by conquest or were settled colonies. I am also clearly of opinion—and I regret to see that a doubt was entertained upon the subject—that this Merchant Shipping Act does generally apply

The Merchant Shipping Act 1854, applies to the colonies; and by the 191st section a master has a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony.

(a) See the *Australia*, post, p. 480.

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to our colonies. I considered so from the beginning, from the matters stated in it, and the preliminary matter; and there is but one exception that I am aware of that prevents the whole of it extending to the colonies, the proviso at the end of the Act, and this appears to me to be the strongest possible recognition of the applicability of the other part to our colonies. The 547th section enacts, that "The legislative authority of any British possession shall have power, by any Act or ordinance, confirmed by her Majesty in Council, to repeal, wholly or in part, any provision of this Act relating to ships registered in such possession; but no such Act or ordinance shall take effect until such approval has been proclaimed in such possession, or until such time thereafter as may be fixed by such Act or ordinance for the purpose." This is the only part that I am aware of which can be found which confers upon the legislative authority of any British possession the power of altering or curtailing any part of the provisions of the statute. It would be impossible to construe this Act without supposing it extended to our colonies, for otherwise there are provisions applying to them, which would not confer the benefit the statute was intended to do, but would produce utter confusion and discord. I have no doubt whatever, therefore, about the jurisdiction upon the present occasion. But now it has been contended that the section I have read, is rendered inoperative on the present occasion by virtue of the 209th section, which has been cited by her Majesty's Advocate, and also commented upon by Dr. Twiss. I am of opinion that when the two sections are read and duly considered, it will appear that the 209th section only applies to very different circumstances there mentioned, and in no degree alters the 191st section. The 209th section enacts, that "Every master of any British ship who leaves any seaman or apprentice on shore at any place abroad, in or out of her Majesty's dominions, under a certificate of his unfitness or inability to proceed on the voyage, shall deliver to one of the functionaries aforesaid, or (in the absence of such functionaries) to the merchants by whom such certificate is signed, or if there be but one respectable merchant resident at such place, to him, a full and true account of the wages due to such seaman or apprentice, such account, when delivered to a Consular officer, to be in duplicate, and shall pay the same either in money or by a bill drawn upon the owner," and so forth. What is this but an additional provision? So far from its being a provision in the nature of curtailing the enactment, and taking away from the seaman the rights he is intitled to by law and statute, this is a provision to prevent a seaman from being left desolate abroad—whether in British dominions or a

The 209th section does not affect the right of the master; it is only an additional provision in favour of the seaman.

foreign State. I am of opinion that all the other remedies are left untouched. Now unless there be *laches* which prevents a master from suing, or unless there be something of a peculiar character which amounts in equity to a defeasance of his demands, he has a lien attachable to the last plank of the ship, for, by virtue of this enactment, a master stands in the same place as a seaman.

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Then was not the master, being at Mauritius, and compelled by necessity to quit the ship, intitled then to claim for wages? As to the *quantum* of wages, I will discuss that presently. I am of opinion that he had such a right by virtue of the enactment I have read. He had a right, if he had thought fit, to arrest this ship, not by the law of Mauritius, for that we have nothing to do with—I mean the municipal law—but by the law of the Admiralty Court, which entertains cases of this description. For even if it had been proved entirely to my satisfaction that, by the law of Mauritius, the master could not have arrested this ship there for his wages, I should have disregarded that law, and said, I must administer the law according to the statute, and have given the master his remedy. I think that, under circumstances of such pressing necessity, the master was intitled to sue for his wages. He had broken a blood-vessel, and it was necessary for him to come to England, and take a passage overland, to save his life. Of course there needed as much expedition as was possible, and the Court must consider whether there was a necessity for him to have his wages at that time. I am of opinion that his wages were necessary then, and that he was justified in making the demand; and I am further of opinion that, if he had been refused, he would have been justified in arresting the ship. It does not appear that the owner of the ship was unable at any time to get written instructions to the master, or that he told him whether he had any agent at Mauritius who was justified in advancing money for the necessities of the ship.

The master, being compelled by pressing necessity to leave the ship abroad, was intitled to wages immediately.

The next point is as to the fair *quantum* of wages. Very great difficulty arises in laying down any positive rule or regulation upon the subject of bottomry bonds, and for obvious reasons. In the first place, the Court must be anxious to protect a *bonâ fide* bottomry bondholder from loss under circumstances which he could not foresee and had no power to investigate; and the Court must be anxious so to do, not simply for the purpose of protecting an innocent person from wrong, but for another great and important reason—that no doubt may be thrown upon these

As to the *quantum* of wages.

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bottomry bonds, which at times and seasons have been the means of salvation to many valuable ships and cargoes. Bottomry bonds Lord Stowell held up with a high hand, and a higher hand perhaps than I have thought myself justified in doing upon similar occasions ; but I have had the misfortune of seeing how very delicate, if I may use the term, persons are in taking bottomry bonds. I recollect a case which was carried up to the Judicial Committee, the *Bonaparte* (a), in which their Lordships were not satisfied with the communication between the master and the owners of the cargo. The case was investigated and all the facts gone into, and their Lordships finally affirmed my judgment. The consequence has been this, that, to my knowledge, in that part of the world there has not been a single bottomry bond given since, nor money advanced. I am cognizant that there are cases in which the Court must overrule bonds taken *bonâ fide* as contrary to law. If there was any case where it was perfectly manifest to the conviction of the Court that there were any items contrary to law included in a bottomry bond, of course the Court would disallow those items, because it is the duty of the Court to protect the owner of the ship and the owner of the cargo, as well as the bottomry bondholder ; and we all know that bottomry bonds are attended with the additional expense of maritime risk. The Registrar and merchants have considered what amount was due to the master, and they have made this statement. They have said, first, that the captain was justified, on account of the state of his health, in giving up the command of the ship at Mauritius, for the purpose of returning to this country by the overland route, and that he was consequently intitled to claim for his wages. They give no opinion as to whether the two items which, it is admitted, were paid to the master at Mauritius, do or do not exceed the amount then legally due to him, and they consider that no blame attaches in regard to the payment thereof by Messrs. Arnal. Now, I have all the papers before me, and I have had the benefit of a very able and learned discussion on both sides, and I must say that I can come to no conclusion whether the wages were due to the master or not. I must say I never saw an instance of greater neglect, or a greater disregard to correctness in doing business, than is exhibited on the part of the owner of this ship, according to his own statement. When representations were made to him from time to time that the master required an increase of wages, he never inquired the extent of wages the master wanted. Upon one occasion he contents himself with giving no answer

The owner has failed to show that the *quantum* of wages paid to the master was improper ; and the full sum therefore must be allowed.

at all, and the second time he gives an evasive reply. It may be said with truth that Messrs. Wiebe & Co. were not the agents of the owners appointed by them, but were appointed by the master; but it was their duty to take care how they acted; and I must presume they did not violate their duty. I must say that if owners of ships will leave their masters in this state of doubt with regard to bottomry bonds, and will not appoint agents themselves, the masters must appoint them, though perhaps they will not discharge their duty with the same caution, fidelity and care that they should do. What were Messrs. Wiebe & Co. to do? If the wages were justly due, how were they to ascertain it? But is the amount, considerable as it is, an exorbitant amount, and did it appear so to the Registrar and merchants? Sure I am that if it had so appeared to the Registrar and merchants, independent of all engagements and arrangements, they would not have allowed it. I must say I think if the owner on the present occasion has more to pay than he ought to pay, he has brought it all upon himself. He has left the matter in so much doubt that I think it difficult to say what was the amount of wages due to the master. I do not think it necessary to comment upon the cases that have been cited at the bar, for I do not believe they would in any degree alter the opinion that I have already expressed, or vary the reasons I have now declared. Looking at all the circumstances of this case, and regretting exceedingly that the matter should ever have come before the Court—though I admit it to be one of great importance, and demanding great consideration—I am of opinion that I must confirm the report of the Registrar and merchants, and with costs.

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Report confirmed with costs.

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In the Privy Council.

Present—The Right Hon. Lord KINGSDOWN.
The Right Hon. Dr. LUSHINGTON.
The Right Hon. Sir CRESSWELL CRESSWELL.
The Right Hon. Sir LAWRENCE PEELE.

THE AUSTRALIA.

Possession—Sale of Ship by Master abroad—Second Purchaser—Onus Probandi—Laches of Original Owner—8 & 9 Vict. c. 89, ss. 37, 38—Jurisdiction of Vice-Admiralty Courts abroad—Sequestration under 7 & 8 Vict. c. 65, s. 12.

If a ship, being in a foreign port, cannot be sent upon her voyage without repairs, and the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, this constitutes a case of necessity, justifying a sale of the ship by the master.

The first purchaser of the master is bound to prove such necessity; but whether such *onus probandi* attaches to a second purchaser depends on all the circumstances of the case.

An omission by the first purchaser to comply with the Ship Registry Act (8 & 9 Vict. c. 89, ss. 37, 38), does not affect the title of a subsequent purchaser.

A person surveying a ship, with a view to the sale thereof by the master, may be justified in becoming the purchaser.

The owner of a ship, dissatisfied with the sale of his ship by the master abroad, must seek recovery with the utmost possible promptitude, or he may be held to ratify the sale by acquiescence.

Vice-Admiralty Courts abroad have only the ordinary jurisdiction exercised by the Court of Admiralty before the passing of the statute 3 & 4 Vict. c. 65; they cannot therefore try causes of title to ships.

Upon disobedience to a monition to pay costs, sequestration granted under 7 & 8 Vict. c. 65, s. 12.

THIS was a cause of possession appealed from the Vice-Admiralty Court at Hong Kong.

The claimant in the Court below was Silas Burrows, of St. Francisco, California; the defendants (in possession) were Douglas Lapraik and George Chape. In April, 1852, the vessel, then called the *Rob Roy*, an American-built ship, was purchased at St. Francisco by Burrows, and there registered as his property, and chartered for a voyage to Hong Kong and elsewhere. The ship arrived at Hong Kong in June, 1852, and shortly afterwards sprung a leak. She was thereupon surveyed twice; one of the surveyors being John Lamont, a shipwright, and tenders for repairs sent in. After two other surveys the master, finding the cost of repairs would much exceed the value of the ship when

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repaired, and being unable to raise money on bottomry or otherwise, with the advice of the harbour-master and others advertised the ship for sale. On the 3rd of November, 1852, the ship was bought by Lamont. Lamont kept the ship as a hulk, or heaving-down vessel, and never registered the bill of sale. At the end of 1853, there being a great demand for ships for Chinese emigration, he repaired the ship at great cost; and on the 8th of May, 1854, sold her to Lapraik and Chape for a large sum. Lapraik and Chape registered the ship as a British ship, under the name of the Australia, and sailed her to St. Francisco, obtaining a large freight. In November, 1854, Burrows, whose son had been residing at Hong Kong during great part of 1853, and who himself had previously made no complaint of the sale by the master, arrested the ship in a cause of possession. The points of law argued in the Court below for the claimant were, that the sale by the master to Lamont was not justified by necessity and was illegal; and, secondly, that the Registry Act, 8 & 9 Vict. c. 89, had not been complied with, and therefore the sale to Lamont was never completed, and he had no title to convey to Lapraik and Chape. The defendants, 1st, alleged the legality of the sale by the master; 2ndly, denied that a bill of sale of a ship could or ought to be registered unless the ship was intended to be sailed as a sea-going ship; 3rdly, alleged that if registration of the bill was necessary, the default in Lamont could not affect them; 4thly, they alleged that the claimant had, by his own *laches*, lost his right to recover the ship as against them.

The 37th and 38th sections of 8 & 9 Vict. c. 89, are as follow:—"37. And be it enacted, that no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and comptroller of the port at which such ship or vessel is already registered, or to the collector and comptroller of any other port at which she is about to be registered *de novo*, as the case may be, nor until such collector and comptroller respectively shall have entered in the book of such last registry in the one case, or in the book of such registry *de novo*, after all the requisites of law for such registry *de novo* shall have been duly complied with, in the other case, (and which they are respectively hereby required to do upon the production of the bill of sale or other instrument for that purpose) the name, residence and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence and description of the

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purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and further, if such ship or vessel is not about to be registered *de novo*, the collector and comptroller of the port where such ship is registered shall, and they are hereby required to endorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose in manner and to the effect following (*videlicet*):—

Custom-house (port and date).

[*Name, residence and description of vendor or mortgagor*] has transferred by [*bill of sale or other instrument*], dated [*date*], [*number of shares*], to [*name, residence and description of purchaser or mortgagee*].

A. B., Collector.

C. D., Comptroller.

And forthwith to give notice thereof to the Commissioners of Customs, and in case the collector and comptroller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the said collector and comptroller are hereby required to certify by indorsement upon the bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and endorsed upon the certificate of registry as aforesaid.

38. And be it enacted, that when and so soon as the particulars of any bill of sale or other instrument by which any ship or vessel or any share or shares thereof shall be transferred, shall have been so entered in the book of registry as aforesaid the said bill of sale or other instrument shall be valid or effectual to pass the property thereby intended to be transferred as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure the endorsement to be made upon the certificate of registry of such ship or vessel in manner hereinafter mentioned."

The Judge of the Vice-Admiralty Court pronounced for the claimant Mr. Burrows, and decreed possession of the ship to him, or the value thereof, estimated at 22,000 dollars, together with the earnings of the ship to the date of her return to Hong Kong: ameliorations of the ship to be allowed against the 22,000 dollars and the earnings of the ship if necessary. From this

decree Messrs. Lapraik and Chape appealed. There was also an appeal by Burrows against that part of the decree directing ameliorations of the ship to be allowed for in reduction of his money claim.

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Addams, Q.C., and *Hannen* for Messrs. Lapraik and Chape.

Manisty, Q.C., and *Twiss*, Q.C., for Burrows.

Right Hon. DR. LUSHINGTON :—This suit was commenced in the Vice-Admiralty Court of Hong Kong, in the month of November, 1854. The parties to the suit are Mr. Burrows, of San Francisco, the original possessor of the vessel in 1852, and two gentlemen of the names of Lapraik and Chape, the purchasers of this vessel from a Mr. Lamont, who had purchased it of the master in the month of November, 1852, in Hong Kong.

In the month of January, 1856, the suit came to a conclusion, and the decree which was pronounced by the Judge in the Court below is as follows :—The learned Judge pronounced against the interest of Mr. Gaskell's parties, the asserted sole owners of the vessel (the present Appellants), "on the ground of the bill of sale from the captain of the ship to Mr. Lamont not having been duly registered according to the statute 8 & 9 Vict. c. 89, and for the interest of Turner's party" (that is, the original proprietor of the ship), "the lawful owner and proprietor thereof, with costs, and decreed possession of the vessel to the promovent, or the value thereof, estimated at 22,000 dollars, the promovent to be intitled to the earnings of the said ship to date of her return to Hong Kong." It appears that an appeal was then asserted, and the Judge decreed Gaskell's parties to put in bail for the sum of 22,000 dollars, with interest at 7 per cent. per annum in the event of the appeal being dismissed. The ameliorations to be allowed against the 22,000 dollars and the earnings of the ship, if necessary. The costs to be costs in the cause.—This is the decree which is appealed from on behalf of the parties who purchased this vessel from Mr. Lamont, the original purchaser of it from the master. The question for the decision of their Lordships is, whether this decree can be maintained, or whether it ought not to be reversed, and, if reversed, in what manner.

Judgment in
Court below.

With respect to the reason assigned in the decree it is manifest that the decree cannot be sustained on any such reason, because it is of no consequence to the present question, in this case, whether the statutes were complied with or not. The true question, and

Any omission
on the part of
the first pur-
chaser to com-
ply with the
Ship Registry

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Act cannot affect the title of a subsequent purchaser.

Was the sale by the master under the circumstances legal?

If the ship, being in a foreign port, cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, this constitutes a case of necessity, justifying a sale of the ship by the master.

The *onus probandi* lies upon the purchaser from the master; whether it attaches to a subsequent purchaser depends on all the circumstances of the case.

the only question, upon the present occasion is, whether the purchase originally made by Mr. Lamont of the master of this vessel under the circumstances hereafter to be noticed, can or cannot be maintained. It is impossible that the purchasers from Mr. Lamont can be affected by Mr. Lamont not thinking it necessary to register the vessel according to the provisions of the Act. The question comes to this, whether the sale to Lamont was a valid sale, considering all the circumstances which are detailed in these proceedings.

With respect to the law it does not appear to be necessary that we should occupy any time in stating it, because we apprehend that there is no longer any dispute as to what the law really is. The whole of the authorities are to be found, together with the exposition of the law itself, in Lord Tenterden's Book upon Shipping. It would, therefore, be a pure waste of time if we were to attempt to go into any particular statement of the cases or of the law. The law, as we conceive it to be settled, is this—that there must be a necessity for the sale; that when the master has no authority from his owner to sell, the master is not at liberty to sell merely because he deems it to be advantageous to his owner, but that there must be necessity for the sale. The necessity which the law contemplates is not an absolute impossibility of getting the vessel repaired; but if the ship cannot be sent upon her voyage without repairs, and if the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, that constitutes a case of necessity. We should be exceedingly reluctant to relax the law upon this head, because it is of great importance that masters of ships should not divest their owners of their interest without due authority, except they are strictly justified by the necessity of the case.

Much has been said with regard to the *onus probandi*, and their Lordships are disposed to agree that the *onus probandi* undoubtedly lies upon the original purchaser from the master. But how far that *onus probandi* extends in the case of a second purchase, and what effect lapse of time has upon that question, is a difficult matter: it must depend on all the circumstances of the case.

The history of the case is as follows:—[The judgment then examined in detail the evidence as to the cost of the necessary repairs at Hong Kong, and the estimated value of the ship when repaired; their Lordships concluding that the repairs must have

cost, at least, 7,000 to 8,000 dollars, and the value of the ship repaired would have been only 5,000 dollars]

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There has been much argument with regard to advertisements for the purpose of obtaining advances on bottomry. Now, looking at the whole of the evidence in this case, and judging also by past experience, we think that it would have been exceedingly difficult indeed to have obtained any money on bottomry at all in Hong Kong; for we believe the evidence to be perfectly true that it very seldom, if ever, happens that any money is advanced upon bottomry there, save by the consignees of the cargo, who advance it on account of their large profits. In all these cases we must take into consideration the circumstances of the locality, and the condition of society in the place where the transaction occurs; and we cannot entertain any doubt that at Hong Kong it would have been quite impossible to have obtained the large amount required for the repair of the vessel on bottomry.

Money could not be obtained on bottomry.

Another objection that has been made was, that the sale of the vessel was accelerated, and that it ought not to have been accelerated. That, we think, has been most satisfactorily answered, because the expenses that were being incurred by keeping the ship were very large: without the payment of their wages the crew could not be discharged. Whether the fact as to the wages be as represented by the owner, or whether it be as represented on the other side by the master, the expenses were every day augmenting to a very great extent. So far as we can judge, the master appears to have acted for the interests of the owner in accelerating the sale, instead of allowing it to be protracted, the consequence of which would have been the incurring of large additional expenses.

The sale was properly accelerated.

Then comes another objection, that the purchaser was a surveyor. We should be very sorry to lay down any doctrine which should in any degree weaken the authority of Lord Ellenborough in the case (a) which has been cited. No doubt it is most desirable that the purchasers upon all these occasions should be persons wholly unconnected with the ship itself, and wholly unconnected with any of the proceedings with respect to the survey or otherwise. But then we must bear in mind the state and condition of the place where the transaction occurred; and if we were to lay down the doctrine that at Hong Kong this ship should only be sold to somebody other than Mr. Lamont or Mr.

(a) *Hayman v. Molton*, 5 Esp. 68.

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One of the surveyors justified by the circumstances in becoming purchaser.

Ross, we might just as well say that the ship should not be sold at all; because it appears upon the evidence in this case, that those were the only two shipwrights in the place, except one other person who is said to have had very little or no business: those two persons were the only two purchasers that could be procured, and if they were rejected there was the strongest possible probability that the vessel would have laid there to rot.

Communication with the owner was impracticable.

Then it was said that Mr. Burrows might have been written to; and that an answer might have been had from him. That argument wholly fails, because, supposing the answer to be obtained in the smallest possible space of time, say in four months, the expenses during that period of four months, it is obvious, would eat up the whole value of the ship; and it was impossible to have waited that period of time without the ship deteriorating to a very great extent in value, as well as incurring the great expenses which have been stated.

Where the owner disapproves of a sale of his ship by the master, he must seek recovery with the greatest possible promptitude, or he may be held to ratify the sale by acquiescence.

A word as to the conduct of Mr. Burrows, the original owner. In all these cases we think it is the duty of the individual who has been divested of his property by means of the act of his own master, and who disapproves of that act, and considers his property to have been sacrificed, to act with the greatest possible promptitude in demanding that justice should be done to him, and for very plain and obvious reasons; because the greatest injustice might be done to the purchasers of vessels so circumstanced, unless means of enforcing the rights of the original owner are taken at an early period. For instance, in this present case, this is not the purchase of Mr. Lamont, but a purchase fourteen months after the first sale by two gentlemen who reside in Hong Kong. They might have sold the ship again, so that there might have been transfer after transfer, until at last it would have been scarcely practicable for the last purchaser to have ascertained all the circumstances under which the ship was originally sold by the master. Now, has Mr. Burrows followed this course? The precise time when he was informed of the sale does not, I think, distinctly appear upon these proceedings; but in the month of May, 1852, he sent his son in another vessel to this port of Hong Kong, and he must have been apprised of these proceedings, and he must have had an opportunity of instructing his son to assert his right at a much earlier period than the month of November, 1854, that is, the time when he does institute this suit. Now it is very true that delay alone may not destroy the right of a party to institute a suit; but when unnecessary delay arises, and when injury to others may result from that delay,

Conduct of the original owner to blame in this respect.

that delay may import acquiescence in the sale ; and if there be acquiescence in the sale, then, according to all the authorities, however unauthorized the sale might have been at its commencement, it is then ratified by the act of the owner himself. There is a letter of Mr. Burrows which is of considerable importance with regard to this part of the case. This letter has been very much commented upon by the counsel on both sides. It is not necessary to say that it amounts to a declaration of acquiescence or to ratification ; but it clearly amounts to this : that after being fully informed of all the circumstances relating to the sale of this ship, he adopts no measures for asserting his rights at the earliest period that the circumstances allowed. It cannot be said that he, being resident at San Francisco, therefore had no means to assert his rights. It would have been very easy for him to have asserted them through the medium of his son ; it would have been very easy for him to have asserted them through the medium of his correspondent at Hong Kong ; but he took no step of this description, until when ? Until the whole state of things had undergone a perfect and entire change, and instead of the market for shipping being, as it had been, exceedingly dull and inauspicious to shipowners, it rose to a state of the greatest activity, in consequence of the accidental circumstance of there being a large passenger traffic carried on from China to San Francisco ; and then, when this vessel had been improved to the extent of 17,600 dollars, and also an additional sum expended on the part of the purchaser, so that she was worth 22,000 or 23,000 dollars, then he thinks it expedient to come forward and demand restitution of his vessel, and her earnings subsequently to the sale.

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Their Lordships are of opinion that in this case the entire destitution of this vessel is satisfactorily proved ; that she was so damaged that the repairs which would have been indispensably necessary in order to enable her to convey a cargo would have much exceeded her value ; and that even if that had not been the case, the money necessary for the repairs could not have been obtained ; that, upon the whole, the conduct of the master in selling the vessel was not merely an act of prudence—not merely an act done for the advantage of his owner—but was an act of absolute necessity in the sense in which we use that term ; and that there is no doubt that the sale was a justifiable sale according to the exposition of the law which is laid down by the highest authorities.

The sale by the master was legal.

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Judgment reversed, with costs.

Vice-Admiralty Courts have only the ordinary jurisdiction possessed by the Court of Admiralty before the 3 & 4 Vict. c. 65: they cannot therefore try causes of title to ships.

Their Lordships are of opinion that the decree of the Court below must be reversed, and that the Respondent must pay the costs in this Court and in the Court below.

I ought to have said one word with respect to the jurisdiction in cases of this kind. Their Lordships have decided this case upon its merits, because it appeared to them that it would be more satisfactory on the whole so to do, but the state of the law must be taken to be this. A Vice-Admiralty Court has no more than the ordinary Admiralty jurisdiction. That jurisdiction is the jurisdiction which was possessed by Courts of Admiralty antecedent to the passing of the statute which enlarged it. What is the nature of that jurisdiction in a cause of this description will be seen from the judgments of Lord Stowell upon that subject, which are collected together in Mr. Pritchard's Digest. It would be a dangerous thing, after the hearing of this cause, to resort to a Vice-Admiralty Court for the purpose of trying the title to a ship in a case of this description.

Toller, proctor for the Appellants.

Clarkson for the Respondent.

The bill of costs of the proctor for the Appellants having been porrected and taxed at 540*l.* 17*s.* 4*d.*, the Surrogate decreed a monition against Burrows the Respondent to pay the same, with expenses of the monition, into the Registry, within six days after service. The monition was returned, personally served on the Respondent at Paris. The Respondent did not obey the monition, nor give any appearance to it.

Sequestration granted under 7 & 8 Vict. c. 69, s. 12.

On a subsequent day *Hannen* moved their Lordships, under the provisions of 7 & 8 Vict. c. 69, s. 12, to pronounce the Respondent to be contumacious and in contempt, and to cause process of sequestration to issue under the seal of her Majesty in Ecclesiastical and Maritime causes, against the real estate, goods, chattels and effects wheresoever lying of the Respondent, within the dominions of her Majesty.

Their Lordships granted the motion.

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August 4.*In the High Court of Admiralty.*THE MARTHA, Gorz, *Master.**Salvage—Misconduct of Salvors—Costs.*

Salvors guilty of misconduct in resisting the employment of a steamer, held to have forfeited thereby all claim to salvage reward ; but, under the circumstances, not condemned in costs.

Negotiation by the owner to refer a claim of salvage to arbitration is no conclusive admission of salvage services rendered, or negation of a defence on the ground of the salvors' misconduct.

THIS was an action of salvage, brought by the master and crew of the Dreadnought, a Ramsgate lugger, for alleged services rendered to the Martha, a barque belonging to Rostock, in Mecklenburg Schwerin.

On the 5th of March, 1859, about 4 P.M., the Martha got aground on the north sand head of the Goodwin Sand at low water, in consequence of missing stays ; and after an ineffectual attempt to back off, hoisted two lights as a signal for steam assistance. The crew of the Dreadnought observing the lights, and also some rockets which were sent up about the same time from the Light-ship, put off from the shore, and boarded the vessel, and shortly afterwards engaged further hands from two other Broadstairs boats. It was disputed between the parties whether the master of the barque then committed his vessel to their charge, or whether the boatmen forced their services upon him ; they proceeded, however, to anchor their lugger, and make preparations to get the barque's bower anchor into her, with a view to lay it out and haul the barque off thereby, and were so engaged, when a Ramsgate steamer came up. The evidence was very conflicting as to what then ensued. The master certainly engaged the steamer, and the steamer finally towed the barque off, and into Ramsgate harbour before ten o'clock ; but the boatmen alleged that in various ways they contributed to getting the vessel off the sand in safety. On the other side it was alleged that they committed great misconduct in resisting the crew of the barque availing themselves of the aid of the steamer ; that they attempted to cut the hawser ; that they made a great riot and confusion on deck ; and that they wrongfully let go the barque's anchor, and thereby detained the vessel on the sand,—all of which was in turn denied. The boatmen, in addition to their direct evidence, also relied on the fact that

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after the vessel was arrested, the London broker of the barque had called on the agent of the boatmen, and suggested that their salvage services should be referred to arbitration.

Jenner, Q.C., and Spinks, for the salvors.

Deane, Q.C., and Tristram, for the owners.

Judgment.

DR. LUSHINGTON:—In causes of salvage the Court is well accustomed to meet with statements and evidence which cannot altogether be reconciled ; such contradictions arise sometimes on matters of fact, but more generally on matters which to a great degree may be questions of opinion, as the degree of danger, or probability of total loss. In such cases the Court arrives at the best conclusion it can, without absolutely discrediting the evidence on either side: it makes deductions, remembering that interest, partisanship, and similar considerations, often lead to exaggeration, yet it may be not to wilful falsehood and perjury. But on the present occasion all attempts to reconcile the evidence are obviously vain: facts of a most striking description are unequivocally alleged, and as distinctly denied. Either the statements are wilfully false, or the denial.—[The learned Judge then proceeded to examine the evidence in detail.]

Negotiation by the owner is no conclusive admission of a salvage claim.

These charges of misconduct against the salvors are very serious, and, if proved, would take away all claim to salvage. They are, however, as might be expected, denied, and it is further alleged that the owners could not believe them to be true, for they had entered into negotiations for the settlement of the salvage. I am of opinion that little force can be attributed to these negotiations, for unless all the parties negotiating are fully apprised of all the circumstances of the case, which may often not happen, it cannot be maintained that a negotiation is an admission of the services, or a negative of a defence to the claim.

I cannot shut my eyes to the great change which has taken place with regard to salvage services by the introduction of steam power. In almost all cases of distress, the services of a steamer are infinitely more efficient than those of boatmen. The consequence is that steamers are constantly employed instead of boatmen who formerly mainly depended on their salvage exertions for their subsistence, and this has most particularly been the case in the neighbourhood of Deal. We cannot be surprised if, under such circumstances, the boatmen are very reluctant to relinquish their prizes, for such they are to them, to

the agency of steamers. Having weighed this and other considerations, and all the evidence, to the best of my power, I have come to the following conclusions:—1st. That the conduct of the boatmen in going off to the assistance of this vessel was meritorious; that they were called upon so to do by the signals, whatever was really intended by the signals. 2ndly. That the charge of the vessel was not given up to them. 3rdly. That the measures they intended to pursue in laying out an anchor, might have been judicious, if steam assistance had not arrived before that could be effected. 4thly. That when steam assistance arrived, and was engaged by the master, it was their duty to have desisted from the work they were attempting to do. 5thly. That they were guilty of misconduct in impeding the employment of the steamer, and more especially in creating a riot and disturbance, and that they have forfeited all claim to salvage reward. 6thly. That considering their original conduct was laudable, and that though I think misconduct has been proved, I am not prepared to say to the extent alleged, or from the motive attributed, I shall not condemn the salvors in costs.

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The salvors
have forfeited
all claim to
salvage reward
by misconduct.

Under the cir-
cumstances
costs not given.

Dyke, proctor for the salvors.

Deacon for the owners.

THE HELGOLAND.

*Bottomry Bond—Concealment—Abandonment of Voyage—
Laches—No privity between Bondholder and Mortgagee—
Jurisdiction—Effect of after-transactions upon the Bond—
Evidence.*

The Court has jurisdiction in the case of a bottomry bond, given by a British subject on the occasion of his purchasing a British ship abroad and raising money for her outfit to return home and a new voyage.

A bottomry bond originally valid is not affected by any agreement by the bondholder for the purchase of the ship.

A bottomry bondholder is under no obligation to communicate the existence of the bond to the mortgagees of the ship, and is not affected by the owner concealing it from the mortgagees.

A bond becomes payable upon the abandonment of the voyage agreed upon in the bond.

A mortgagee cannot set up as a defence to a bond the laches of the bondholder, unless his position has been thereby prejudiced.

THIS was an action to enforce a bottomry bond, dated May 24, 1858, originally given to Ernest Etienne, and by him in January, 1859, indorsed to the plaintiff, Joseph Lumsdon.

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1859. The defendant, Charles Wells, mortgagee of the vessel under a
August 11. deed dated July 11, 1858, denied the validity of the bond for the following reasons:—

1. Defect of form.
2. Purchase of the vessel by the bondholder and others.
3. Assent of the bondholder to a change of voyage from that contemplated by the bond.
4. Concealment of the bond from the mortgagee.
5. Laches in enforcing the bond.
6. Absence of necessity for bottomry.
7. No consideration.

The plaintiff took issue upon these averments, and alleged satisfaction of the mortgage of defendant by payment since the institution of the suit. At the hearing also the defendant questioned the jurisdiction of the Court. The facts were as follows:—

Facts.

In the month of May, 1858, the *Helgoland*, formerly called the *Apollo*, was lying at Hamburg: Mr. Zoder was her owner; and Augustus Collingridge her master. The latter was desirous of purchasing her; and for this purpose applied to Messrs. Bremer and Wells, of London, to make advances to him. They agreed to advance him 400*l.* on the security of bottomry, with maritime premium thereon of 200*l.*, upon the understanding that they should advance any further sum which might be requisite for the barque on her arrival in England, and that on her arrival the bond should be given up, and they should become the mortgagees of the ship to the extent of the 600*l.*, and further advances. Accordingly on May 10, Messrs. Bremer and Wells sent over to Collingridge a letter to Messrs. Sloman, of Hamburg, but he refused to make any advance. Whereupon, on May 15, Collingridge protested, and on the 21st or 22nd of May, drew a bill upon Sack, Bremer & Co., of London, and got the same discounted on May 22nd, by a Mr. Pfeiffer, a banker at Hamburg, but with some deductions. He only received about 355*l.* On the 20th of May, Collingridge, according to agreement, executed to Messrs. Bremer and Wells a bottomry bond for 600*l.*; and on the 22nd of May, procured the provisional Consular certificate that he was entitled to be registered in Great Britain as owner. Collingridge, however, was, according to his own statement, in want of more money for the outfit of his ship, and procured for this purpose from Ernest Etienne a loan of 160*l.*, paid in instalments between May 15 and May 21, upon

the security of the bottomry bond, now put in suit. The bond was in the following terms:—

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“ Know all men by these presents, that I, Augustus Collingridge, master of the barque Apollo, now in the Elbe, and chartered by way of the east coast of England to Ancona, and from thence home to the United Kingdom of Great Britain and Ireland, with a cargo of timber for the use of her Majesty’s dockyards, am held, and firmly bound to Mr. Ernest Etienne, of No. 51, Rue Taitbout, in the city of Paris, in the empire of France, in the sum of 160*l.* British sterling, or to such person as by his indorsement to be made on these presents he shall order and appoint as his attorney or attorneys to receive the same, together with maritime interest at the rate of 7½ per cent., for moneys advanced to equip and fit out the said barque Apollo, and enable the ship to proceed upon her present voyage, which the aforesaid Ernest Etienne has advanced upon the risk of the said voyage.

“ Now, the conditions of the before within obligation are such, that if the said vessel do and shall with all convenient speed, proceed to Ancona, and home to the United Kingdom of Great Britain and Ireland, to one of her Majesty’s dockyards, as before described—the dangers of the seas and navigation, risks of war and restraints of rulers, excepted—and if the before bounden Augustus Collingridge, his heirs, executors, administrators or assigns, within thirty days next after the safe arrival of the said vessel in a dockyard or other port of discharge in the United Kingdom do and shall well and truly pay or cause to be paid unto the said Ernest Etienne, his orders, appointees or assigns, the sum of 160*l.* British sterling, with the maritime interest 7½ per cent., being the amount advanced for enabling the said vessel to proceed on her voyage as aforesaid, or if in the course of the said voyage an utter loss of the said barque Apollo shall unavoidably happen, then this obligation shall be void, or else shall be and remain in full force and virtue.

“ Given under my hand and seal this 24th day of May, 1858, upon the bottom of the said ship Apollo.

“ AUGUSTUS COLLINGRIDGE, Master. (I.S.)

“ Signed in the presence of W. Waddilove, her
Britannic Majesty’s Vice-Consul at Hamburg.
(Seal.)

“ Endorsed.

“ Pay Mr. Joseph Lumsdon, of
Sunderland, or order.

“ ERN. ETIENNE.”

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Ernest Etienne was a clerk in the house of Messrs. Aubin & Co., of Paris; and apparently about the same time that he lent the money on bottomry, he, on behalf of Aubin & Co., was in treaty with Collingridge for the purchase of the vessel, for on the 25th of May (the day after the date of the bottomry bond), an agreement for the purchase was executed, and it contained a recital that an instalment to the extent of 16,000 francs had been already paid to Collingridge. This agreement, however, was never carried into effect.

Collingridge left Hamburg in the *Helgoland* at the latter end of May, and proceeded to the Tyne, where he arrived at the beginning of June, and on June 17 was finally registered as owner. On the 11th day of June, 1858, Collingridge, according to his agreement, executed to Charles Wells a mortgage of the ship for 600*l.*, and covenanted therein that he had power to mortgage free from incumbrances. At the same time Wells delivered up the former bottomry bond for the same sum. The vessel did not go to Ancona, as had been agreed verbally between Collingridge, and Bremer and Wells, and also between Collingridge and Etienne, by the bottomry bond; but was taken by Collingridge (whether with or without the knowledge of Etienne was disputed) first to Cuxhaven and Cronstadt, and back to Hull, where she arrived on August 28, 1858; and secondly, from Hull to Elsinore, and back to Hull, where she arrived on December 7, 1858. In January, 1859, Wells being unable to obtain payment for his advances, advertised the ship for sale, under his power as mortgagee. The sale was fixed for February 3, 1859, but on the very morning the ship was arrested at the suit of Joseph Lumsdon, as holder of the bottomry bond of May 24, 1858. It was to enforce this bond that the present action was brought (a).

(a) DATES.

1858. May 10. Letter of credit from Bremer & Wells to Sloman.

15.)
21.) Receipts for instalments of 160*l.* from Etienne.

20. Bottomry bond to Bremer & Wells for 600*l.* executed.

22. Bill for 400*l.* on Sack, Bremer & Co., drawn by Collingridge and discounted.

24. Bottomry bond for 160*l.* executed to Etienne.

25. Agreement between Etienne and Collingridge for purchase of ship.

June 11. Mortgage for 600*l.* to Wells.

17. Collingridge entered as owner on British register.

Aug. 28. Arrival of vessel at Hull from Cronstadt.

Dec. 7. Ditto from Elsinore.

1859. Jan. 10. Indorsement to plaintiff of bond for 160*l.*

Feb. 2. Vessel arrested by plaintiff.

Addams, Q.C., and *Twiss*, Q.C., for the bondholder.

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Deane, Q.C., and *Wambey*, for the mortgagee.

DR. LUSHINGTON:—There are two questions before the Court: one, the question as to how far the transaction of the bottomry bond was a *bonâ fide* transaction, which can only be answered after an examination of all the facts of the case; the other involving a point of law, viz., whether this Court has jurisdiction in the case of such a bottomry bond as the one now put in suit. To take the latter question first. *Argumenti gratiâ*, I shall assume the following to be a correct statement of the facts: That Collingridge was the purchaser of this vessel at Hamburg, and was also the master thereof; that at the date of the purchase he was a British subject (he is described of Queen Street, Westminster); that he was in want of funds in order to enable the vessel to leave Hamburg to proceed to England, thence upon a voyage to Ancona, and thence home to England. I will further take it for granted, that the 160*l.* was *bonâ fide* advanced by Ernest Etienne, and duly expended for the purpose expressed, and that the bottomry bond was duly executed.

Judgment.

Two questions:
one of the facts,
the other of law.

Upon this state of circumstances arises a question of great importance, which I believe has never yet been directly decided in the Court of Admiralty. The question is, whether a person can in this Court sue upon a bottomry bond given by a British subject on the occasion of his purchasing a British ship abroad and raising money for her outfit. I think that the authorities show that if the owner of a British ship in England were to raise money upon a bottomry bond for any voyage whatever, the bondholder could not sue in the Admiralty Court. The present case, however, is materially different. It is a case of borrowing money in a foreign country by a British purchaser for the purpose of bringing home the vessel, and undertaking a new voyage: in such a case there is a necessity for borrowing money on bottomry. There is maritime risk and maritime premium, and I am not aware of any reason why the Court should not entertain jurisdiction. I cannot perceive any real distinction between a bottomry bond, such as ordinarily falls under the jurisdiction of this Court, and a bottomry bond given under the circumstances I have assumed.

The Court has jurisdiction in the case of a bottomry bond given by a British subject on the occasion of his purchasing a British ship abroad and raising money for her outfit to return home and make a new voyage.

I am at a loss to understand why such a branch of commerce should be interdicted to a British merchant, or why the owner of

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such a ship should be interdicted from so raising money; and I cannot hold it consistent with justice that the foreigner who advances his money upon such a bottomry bond, should be deprived of all efficient remedy to recover what is due to him. For these considerations I should be exceedingly reluctant, unless compelled by authority, to refuse the aid of this jurisdiction to a suitor so circumstanced. I refrain from making observation upon the cases cited, for I think that they leave this point wholly unsettled.

The question of jurisdiction should have been raised by an appearance under protest.

I ought to observe that this question which I have been discussing is a question of jurisdiction, which ought to have been raised by an appearance under protest. This step was not taken. It may be doubtful whether a party omitting to take the objection in the first instance can be permitted to raise it afterwards: but, however that may be, I do not think myself justified in passing over the question in silence, when it has now occurred, as I believe, for the first time.

Having thus expressed the inclination of my opinion upon the point of law, I shall now proceed to examine these obscure and complicated transactions, and ascertain to the best of my ability whether, assuming the law to be in favour of such a bottomry bondholder as I have described, the plaintiff is intitled to the benefit of such law in the present instance.

The defendants have raised various objections to the bond. Their first objection is as to the form of the bond.

1st Objection:
defect of form
of the bond.

I think that there is nothing in the form of the bond objectionable. It is to be remarked, however, that the execution is proved by no other evidence than the seal, and is expressed to have been made not before a notary, as is most usual at Hamburg, but before the British Vice-Consul, and is proved by no other evidence but the seal. But the execution is not denied, and no objection is raised on the latter account. It is also somewhat singular that the interest should be $7\frac{1}{2}$ per cent. on this bond, under which the risk was for the whole voyage to Ancona and back to Great Britain; whereas the bond to Bremer and Wells carried an interest of 50 per cent. on a risk from Hamburg to Hull.

2nd Objection:
purchase of the
vessel by the
bondholder
and others.

The next objection is, that Collingridge, in May, 1858, in conjunction with Etienne and others, forming a company in Paris, purchased this vessel and became the real owners.

The evidence in support of this consists of a Memorandum of Agreement, dated May 25, 1858 (one day after the date of the bottomry bond, and several days, according to the evidence and the receipt after the payment of the 160*l.*), and which, so far as is material, was as follows:—"Augustus Collingridge, captain and sole owner of Apollo, now about proceeding to Newcastle-upon-Tyne under provisional certificate of registry, agrees to sell to Mr. Pierre Aubin, and the said Mr. P. Aubin, by his agent Ernest Etienne, agrees to buy the said ship for the sum of 48,000 francs cash, delivery to be made of the said ship to Mr. P. Aubin, in the United Kingdom, within thirty days of the safe arrival from the present intended voyage to Newcastle and the Mediterranean home to United Kingdom. Captain Collingridge acknowledges to have received from the purchaser Mr. P. Aubin, by his agent Ernest Etienne, the sum of 16,500 francs, which, in case of non-fulfilment of this contract by the said Mr. P. Aubin, is to be forfeited to his entire use and profit as liquidated damages, in consideration of his having paid a sum of money fixed as a sufficient premium of insurance to cover a policy or policies upon the above intended voyage."

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There is further evidence, some letters annexed by Messrs. Bremer and Wells in their act on petition, which show that in May, 1858, certain agreements were entered into between Collingridge and Etienne, the clerk of Messrs. Aubin & Co., but what they were, unless they affected the ownership of this vessel or the bottomry bond, I have no concern. I am unable, either from this correspondence or the other documents produced, to come to the conclusion that any French company became the owners of this vessel,—legal owners they certainly were not. Collingridge was then provisionally registered as owner. Messrs. Aubin & Co. seem to have exercised no act of ownership; the only insurances made by them were to cover this sum of 16,000 francs, and by Etienne to cover his 160*l.* Etienne appears to have been only clerk to Messrs. Aubin & Co.

Finally, the bottomry bond, if originally valid, would not be affected by any agreement by the bondholder for the purchase of the ship. Moreover, I think I am justified in concluding, that through the year 1858 the vessel remained the property of Collingridge, subject to the mortgage. As to what occurred in 1859 the Court has very imperfect information. In some way or other disputes arose between Collingridge and Messrs. Bremer and Wells. I have not the smallest means of forming an opinion who was right or who was wrong; and for-

A bottomry bond originally valid is not affected by any agreement by the bondholder for the purchase of a ship.

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tunately this case, as to bottomry, can be decided without the solution of that question. Collingridge alleges that Bremer and Wells were paid off, since the institution of the suit, by the receipt of two bills of exchange for 400*l.* each: it does not, however, appear that these bills were paid. This can be of no importance to the present investigation, as it is distinctly admitted that Bremer and Wells, as mortgagees, have a *persona standi*.

The next objection is, that Etienne assented to the ship going, not the voyage from the Tyne to Ancona, as contemplated in the bottomry bond, but from the Tyne to Cronstadt.

3rd Objection :
assent of the
bondholder to
a change of
voyage from
that con-
templated by
the bond.

There is no proof that Etienne knew of that change before it had taken place, or that he had any means, if he had the knowledge, of preventing such change. On the contrary, it appears that, upon receiving the information of the change, he took the best step in his power for the protection of his own interest; having insured that interest upon the original voyage, he changed that insurance to cover the new destination. In my opinion the bond cannot be invalidated upon this account.

The next objection is, that the bottomry bond was fraudulently concealed from the defendants.

4th Objection :
Concealment of
the bond from
the mortgagee.

Was the execution of the bottomry bond concealed? and, if so, was such concealment fraudulent, or what is the effect to be attributed to such concealment? As to the fact of concealment, the only evidence I have comes from Bremer. He is asked, "Were you aware of the existence of that bottomry bond before the vessel was arrested at the instance of the holder?" The answer is, "I was repeatedly assured by Captain Collingridge that mine was the only incumbrance on the ship." In this, which I must call a most unsatisfactory state, the matter was left. It is obvious that Bremer might have heard of the bottomry bond from another quarter than that of Collingridge. I believe he had not; but this ought not to have been left to inference. But admitting the fact, that the existence of this bottomry bond was not disclosed to Bremer and Wells, I do not perceive how that circumstance can affect the holder of the bond; though blame might attach therefrom to Collingridge. Bremer and Wells were not the owners, but the mortgagees. I know of no obligation upon Etienne to make the disclosure, nor can I presume that he knew that the interest of the mortgagees was affected by his bond. The covenant in the mortgage of June 11, that the ship was free from incumbrances, is plainly contrary to the facts. But what is the

The bottomry
bondholder is
under no obli-
gation to com-
municate the
existence of
the bond to the
mortgagees of
the ship, and

inference to be drawn from this? If Collingridge, in making that covenant, was cognizant of the effect of it, and if he had really executed the bottomry bond of May 24, 1858, then, towards Bremer and Wells, he was guilty of unfair dealing. But how could this affect Etienne, the bottomry bondholder? If the making of the bond was originally a *bonâ fide* transaction, Etienne could not be prejudiced by any such act done afterwards by Collingridge. There is, however, another view of the case in which the matter I have noticed may be of importance, I mean as affecting the credit otherwise due to Collingridge, for upon his credit much may depend. This, however, is a head I must separately discuss hereafter.

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is not affected
by the owner
concealing it
from them.

The defendants next impute to the plaintiff *laches* and delay in enforcing the bond.

This action was not commenced till the 2nd of February, 1859, the day before the vessel was about to be sold. Now when was the bond due? and why was it not enforced before? I apprehend that if the consent of the lender was not obtained, the bond became due after that the vessel had arrived in Great Britain from Hamburg, and the intended voyage to Ancona was abandoned; for the borrower could have no right as against the lender to change the voyage. The vessel went to Cronstadt and returned. She went a second voyage and came back to Hull in December, 1858. Still nothing was done by Mr. Etienne by way of obtaining payment. He indorsed the bond in January, 1859, to J. Lumsdon, the plaintiff. I must now look to the evidence to find some explanation of that which appears somewhat extraordinary. Mr. Etienne has been examined, and of course had the power of explaining his own conduct. Mr. Etienne has sworn that, five or six weeks after the ship had left Hamburg, he was informed, by letter from Collingridge, of the change of voyage; that he had not previously sanctioned such change; that the money advanced was his own; that he first insured the bond on the voyage to Ancona, and then changed the insurance to the voyage to Cronstadt. Mr. Etienne was examined as a witness to support the validity of the bond; but, nevertheless, not a question is asked him to account for the extraordinary lapse of time before any attempt was made to recover the monies due upon the bond,—not a word of explanation is offered as to the second voyage. This delay, quite unexplained as it has been when there was opportunity for explanation, certainly raises a suspicion against the whole transaction; and had the vessel changed hands in the meantime this objection would have had

5th Objection:
laches in in-
forcing the
bond.

The bond be-
came due on
the abandon-
ment of the
voyage.

Laches of the
bottomry bond-
holder, cannot
be set up

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by the mortgagee unless the mortgagee's original position has been thereby prejudiced.

still greater weight. But this delay does not appear to me to have been prejudicial to the interests of the mortgagees, and the owner of the vessel does not complain. I do not think that I am justified in holding that the bond was thereby vitiated.

I now have to consider whether this bond is accompanied with the essential requisites for the validity of any bottomry bond, viz., the necessity for the advance and the payment of the money.

6th Objection:
absence of
necessity for
bottomry.

The affirmative evidence as to the necessity comes from Collingridge, and to a certain extent he is supported by facts, which I think cannot be doubted. 1st. Early in May, 1858, he had no means of purchasing the ship, and was under the necessity of resorting to Bremer and Wells for an advance for this purpose. 2nd. The sum calculated to enable him to come away on the 6th of May, or soon after, was 400*l.* From Bremer and Wells he did not get any money for some time, not till May 22, and then he got not 400*l.*, but 355*l.* He was detained, as he says, nineteen days, and I think he is generally as to this matter corroborated by the protest. Furthermore, additional expenses must have been incurred in this interval of delay, and 160*l.* alleged to be borrowed from Etienne is not a large sum, not more than might be wanted, or Etienne able to advance. Is there any evidence to prove that Collingridge had funds at the date when the bottomry bond was given to Etienne? The bond was dated May 24, and the 160*l.*, according to the evidence and receipts, had been advanced shortly before. I can discover only one document which tends to show he had the possession of any funds whatever. That document is the agreement above set out, dated May 25, 1858, with Etienne, on behalf of Aubin & Co., for the sale of the vessel, and wherein Collingridge acknowledges to have received 16,500 francs.

Now confining my attention for the present to this agreement, my first observation is, that not one word about the payment of these 16,500 francs is to be found in the examination or cross-examination of Collingridge, or Etienne. The Court is thereby placed in considerable difficulty. 1st. I have to determine whether this document alone is complete evidence of payment. 2nd. If it is such evidence, what is the effect of the payment? Neither of these questions admits of a very satisfactory solution. As to 1st. I apprehend that I may presume from this document that the 16,500 francs were paid. The presumption however may be rebutted, for the consideration is not always paid at the time

of the execution of such agreement. Here, however, there is no evidence to rebut, though both Collingridge and Etienne might have been cross-examined to the facts. As to the 2nd. Assuming that the document shows that Collingridge had 16,500 francs on May 25, how does this circumstance affect the loan on bottomry completed on May 24? It appears to me that this fact alone does not disprove the necessity of prior advances for the use of the ship, nor vitiate the bottomry bond. I think it is sufficiently proved that Collingridge, shortly prior to this agreement of May 25, did want funds for the use of the ship, and for the present I must assume that these funds, to the extent of 160*l.*, were actually advanced by Etienne some days prior to the agreement of May 25. By agreeing to sell the ship Collingridge might put himself in possession of funds which he could not before command.

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Lastly, was the alleged loan of 160*l.* actually advanced? The affirmative evidence is the bottomry bond, and the oaths of Collingridge and Etienne: also, which is very important, the receipts: there are four of them; two dated May 15 (one given by a house of trade on account of this barque), a third dated May 21, and the fourth is without date; these are sworn to be genuine instruments, and I see no reason to doubt it. What is there to oppose this evidence? The mortgagees offer the letter of Collingridge to Lumsdon, written after the institution of the suit, and which, so far as is material, is as follows:—

7th Objection:
Want of consideration.

SIR,

I HEAR that representing Mr. Etienne, clerk to Mr. P. Aubin, of Paris, you have arrested the Helgoland, which has been bailed by Messrs. Bremer and Wells, of Hull. The document on which you have arrested the ship is overridden by subsequent documents under Mr. Etienne's own handwriting. The fact is, Mr. Aubin is my debtor for very considerable sums, for which Mr. Etienne is also jointly liable. I write this as a matter of courtesy, and I recommend you, before you incur expenses, to ascertain whether the document in question is not absolutely void, under every condition which can void such a document. I do not suppose Mr. Aubin has told you that Mr. Etienne purchased the ship subsequent to the bond, as you call it by deed under seal, and has failed conjointly with Mr. Aubin, to complete the purchase.

Yours respectfully,

Lumsdon, Esq.,
Sunderland.

A. COLLINGRIDGE.

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Is this letter adequate evidence to prove the truth of the statements therein contained? What is it? A letter written *post litem motam* by the alleged borrower, offered as evidence against the lender or his indorsee: such letter being no part of the *res gestæ*, a written declaration not on oath. I apprehend that such letter is no evidence to prove the truth of the contents of such letter. So with respect to all the declarations or conversations between Collingridge and Messrs. Bremer and Wells, the same rule applies. It must be recollected that Collingridge, when examined, has never been asked as to the truth either of the contents of this letter or of their conversations. There is not an atom of sworn evidence. Then for what purpose are the letters and declarations evidence? To discredit Collingridge, because he may have given different accounts of the same transaction. Assume that his credit is thereby affected, say it is utterly swept away—what then? There still remains the evidence of the bond itself, of Etienne, of the receipts, and other admitted facts. Upon this evidence, whatever may be the real truth of the transaction, I can come to no other conclusion than that the money was advanced, and that Collingridge required it for the wants of the ship. However, I cannot leave this point without adverting to a letter which has been much commented upon, as written with the fraudulent purpose of giving a colour of *bona fides* to the previous transactions. That letter is as follows:—

Gluckstadt, May 25, 1858.

Mr. Collingridge, Captain of the ship Apollo.

IN advancing the sum of 160*l.* British sterling, for which you have remitted me a bottomry bond on the ship Apollo, payable thirty days after arrival in the United Kingdom, on her return from Ancona, I declare that I had been informed of the advance of 400*l.* made to you by Messrs. Bremer and Wells, and of the conditions of reimbursement.

Receive, Sir, my sincere salutations,

ERNEST ETIENNE.

I am unable to perceive any improbability in such a letter being written. I think that a communication of the fact of the previous loan by Bremer and Wells, was due to Etienne, that he might understand the nature of the security on which he was about to advance his money; and I also think that it was a proper and wise precaution on the part of Collingridge to take an acknowledgment that such a communication had been made. Nor am I able to find out any fraudulent purpose this letter was calculated to answer. I do not apprehend that either of the

parties was conversant with the law as to bottomry bonds, or with the doctrine that the last executed bond has priority over an earlier one. Nor am I clear how far that law would have been applicable in the present case. Were I to indulge in conjecture, I should be inclined to surmise that the parties believed that the last bond was not entitled to preferential payment.

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That there is room for suspicion in this case cannot be reasonably doubted, especially with regard to the conduct of Captain Collingridge, but I have no right to impute any blame which may attach to him, to Etienne. In the absence of clear evidence tending to that end, it would be gross injustice so to do. Having carefully considered the whole circumstances of this case, I have come to the conclusion that the bottomry bond was originally valid, the money having been *bonâ fide* advanced in a case of necessity; and I further think it was not invalidated by any assent having been given by Etienne to the change of the voyage originally intended, or by the bond having been concealed, or by the delay in enforcing it. I pronounce for the bond. I consider it to be my duty to do so upon the evidence produced, for that alone must be my guide. I only regret to think that so many circumstances of importance with regard to this transaction have been left in doubt and obscurity.

Bond pronounced for.

Clarkson, proctor for the bondholder.

Rothery, proctor for the mortgagee.

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CARGO EX SULTAN, JOHN BERRY, *Master*.

Respondentia — Jurisdiction — Maritime Risk — Bond good in Part only — Apportionment of Bond.

The Court of Admiralty has jurisdiction over bonds of respondentia, as over bottomry bonds.

Where a vessel carrying cargo is stranded on a foreign coast and unable to proceed, and communication with the owners of the cargo would be attended with great delay and difficulty, the master of the ship, in order to tranship and send on, may, on his own authority, give a respondentia bond to release the cargo lying under arrest for salvage.

A bond, covering in part property not exposed to maritime risk, is bad as to that part, but may be valid as to the residue.

Where a part only of goods hypothecated by a respondentia bond reaches its destination, such part is only liable to pay a proportional part of the money secured by the bond, namely, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given.

The American ship *Sultan*, carrying cargo from New York, consigned to various owners in Liverpool, was stranded off Key West, in Florida, and became unable to proceed on her voyage. The cargo was salvaged, and arrested in a suit by the salvors. The master resolved on his own authority to tranship, and to release the cargo, borrowed money to pay the salvage award, upon agreement to give a respondentia bond on the whole cargo saved for the voyage home. A great portion of the cargo was then shipped on board a second vessel, which vessel whilst loading caught fire, and thereby a large part of the cargo was consumed and fresh salvage expenses incurred. A second salvage suit was brought, and the goods salvaged were sold and the proceeds paid into Court. The rest of the *Sultan's* cargo was then shipped on board a third vessel and brought safely to Liverpool. Before sailing the master of the *Sultan* gave a bottomry bond for the whole amount of the original agreement, professing also to bind thereby the goods or the proceeds lying in possession of the Court. The Court afterwards ordered the proceeds should, on a day certain, be paid out to the bondholder, unless the owners of the cargo produced evidence that the bond had been fully satisfied in England. Upon an action brought upon the bond in the Admiralty Court in England, against the cargo brought to this country, for the full amount:—*Held*,

1. That the Court had jurisdiction over the bond.
2. That in the circumstances the master was intitled to make the agreement for the bond without communicating with the owners of the cargo.
3. That the bond was not wholly vitiated because professing to bind the cargo which was lying in the possession of the Court, and therefore not exposed to maritime risk.
4. That the owners of the cargo brought to England should pay a proportional part of the bond only, namely, according to the proportion the value of their property bore to the total value of the cargo upon which the bond was agreed to be given; although thereby the bondholder would be a loser, even if the whole of the proceeds lying in the Court of Florida were paid over to him.

RESPONDENTIA. In April, 1858, the *Sultan*, an American ship, sailed from New Orleans with a cargo, chiefly of cotton. On the 9th of May she was stranded on the Florida

reef, and sustained great damage; was assisted by salvors and taken to Key West. A cause of salvage was promoted in the District Court of Florida, and the Court decreed the sum of 18,000 dollars as salvage on the ship and cargo, together with expenses. The total amount attaching on the cargo was 28,648 dollars. The cargo having been landed, a small portion was found to be damaged, and was sold by order of the Court. The master of the Sultan was of opinion that it would be for the benefit of the owners of the cargo to tranship the residue and forward it to Liverpool. He thereupon agreed with Preston A. Ames, of Boston, to advance the money to defray the salvage, so as to enable him to tranship the cargo and forward it to its destination, Ames stipulating that his advance should be secured by respondentia on the whole cargo. The money was so advanced, and on the 25th of June paid to the marshal of the Court. Part of the cargo (which still continued technically in the custody of the Court, certain charges thereon being unascertained and unpaid) was then shipped on board the ship *Otseonth* for Liverpool. This ship took fire and was destroyed, a great part of the goods shipped (constituting also a considerable portion of the Sultan's cargo) was consumed, and the remnant was so damaged as to render a sale necessary. The residue of the Sultan's cargo, amounting to about half of the original cargo, was then shipped on board the *T. J. Roger*, and was finally brought to Liverpool on the 30th of November. Before sailing, the following bond was signed by the master of the Sultan:—

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“ Know all men by these presents, that I, John Berry, master of the ship *Sultan*, am held and firmly bound unto Preston A. Ames, of the city of Boston, in the United States of America, in the full sum of 30,000 dollars, lawful money of the United States of America, to be paid to the said Ames or his certain attorney, or his executors, administrators or assigns, to which payment I bind myself firmly by these presents.

Sealed with my seal, and dated on this 5th day of October, in the year of our Lord 1858.

Whereas the said ship *Sultan* having laden on board a cargo of cotton and corn, was accidentally stranded, and suffered great damage, and was taken into the harbour of Key West, by salvors, and her cargo discharged, some being damaged, and whereas great expense for salvage and other charges were necessarily incurred and were charged on the said cargo, and which the said master was unable to pay.

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And whereas the said Ames did contract and agree with the said Berry to advance the sum and sums of money necessary to enable him to pay the same charges and expenses upon the goods and merchandize, lately the cargo of the ship *Sultan*, to be reshipped and forwarded from Key West to their destination, (that is to say,) to the port of Liverpool, in England, it being expressly agreed, before any part of such advance was made, that such advance should be by way of respondentia on the said cargo, in the voyage last aforesaid; and whereas, under and pursuant to the agreement last aforesaid, the sum of 28,648²²/₁₀₀ dollars was advanced as aforesaid, and a part of the said merchandize was laden at Key West, in and on board of the ship *Otseonthe*, to be carried to Liverpool aforesaid, in a voyage to be thereafter commenced and prosecuted by the said ship *Otseonthe*, and while the process of lading the same was going on the said ship *Otseonthe* took fire, and, together with a part of the said merchandize then on board, was destroyed, and the residue of the said merchandize on board was so damaged as to render a sale thereof necessary. Now, in pursuance of the original agreement aforesaid, and in execution of the same, so far as the execution thereof has not been rendered impossible by the act of God, and without intending to displace or prejudice any claim, right or lien of the said Ames, in or to what was saved from the merchandize so shipped on board the *Otseonthe*, but on the contrary, expressly admitting and declaring that, according to the understanding of the undersigned Berry, in equity and good conscience, the same to stand affected and bound unto him, the said Ames, in like manner, as the residue of the said goods and merchandize which have now been laden at Key West, on board the ship called the *T. J. Roger*, and bound for Liverpool, are hypothecated and assigned over by way of respondentia security, as the same are hereby declared to be hypothecated and assigned over for that end, and that the same are to be delivered to no other use whatsoever.

Now the condition of the above-written obligation is such, that, if the said ship *T. J. Roger* do and shall depart from Key West, and sail to and arrive at Liverpool, and if the said John Berry shall pay unto the said Ames, or his legal representative, within ten days after such arrival, the full sum of 28,648²²/₁₀₀ dollars, together with a premium thereon of fifteen per cent., or if in the said voyage an utter loss of the said ship by any perils of the sea, which are insured against under policies (a form whereof is hereto annexed) shall unavoidably happen, and the said Berry, or those for whom he acts, shall well and truly, without delay,

account with the said Ames, or his representatives or assigns, for the just salvage which shall be received from and on account of the said hypothecated merchandize, and shall well and truly pay or deliver the same unto him or them, and shall not deliver the said merchandize to any other use whatsoever, without payment of the principal and interest and premium due on this bond, then this obligation shall be void, otherwise to remain in full force.

JOHN BERRY.

(*L.S.*)”

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A salvage suit also arose in the Florida Court out of salvage services rendered to the *Otseonthé*, the result of which was that the net proceeds of the cotton salvaged and sold, after deducting the proportion of salvage, amounted to 12,671 dollars. The Court thereupon, 25th of April, 1859, upon consideration of all the circumstances of the case, and to do justice to all the parties, ordered this balance to be paid to the attorney for the owners of the cargo of the ship *Sultan*, upon producing satisfactory evidence to the Court that the respondentia bond was satisfied; and, in default of such evidence being furnished before 25th of July, 1859, decreed the balance should then be paid to Ames in part satisfaction of the bond. The cotton brought home in the *T. J. Roger* was consigned to fifteen houses in Liverpool. The present action was brought by the holders of the bond, and defended by the consignees of the cotton. The petition prayed the Court to pronounce for the bond and to condemn the defendants therein and in costs. The answer, on the part of the defendants, denied that the money was advanced on respondentia security, or that any advertisements for respondentia were made at Key West or elsewhere, and alleged that the hypothecation of the cargo was made without the knowledge or consent, either express or implied, of the several owners of the cargo. It concluded thus:—“That the said respondentia bond is, by reason of the premises, and for divers other reasons apparent upon the face of the said bond, invalid and bad in law, and particularly that by reason that the payment thereof is not made subject to the usual maritime risks, and also by reason that the larger part of the said cargo thereby hypothecated, to wit, the aforesaid portion thereof shipped on board of the said ship *Otseonthé*, was so hypothecated notwithstanding and subsequently to the destruction of part thereof, as aforesaid, and notwithstanding and subsequently to the aforesaid sale of the remainder thereof, and notwithstanding the balance of the said proceeds thereof, were, at the time of the execution of the said bond, and still are, deposited in the registry of the said Court at Key West, have not

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been delivered to the owners of the said cargo, and were not and are not liable to the usual maritime risk; and because that portion of the cargo brought to this country by the said ship *T. J. Roger*, as aforesaid, is, by the said bond, made liable to the whole amount of the said bond."

Deane, Q.C., *Twiss*, Q.C., and *Wambey* for the bondholders.

Although no case can be found in the records of this Court pronouncing upon a respondentia bond, the Court has jurisdiction over respondentia as over bottomry. They are of the same nature, contracts of loan by hypothecation on maritime risk; and in the books they are always treated of together (*a*). The statute 19 Geo. 2, c. 37, s. 5, places them in the same category. In the case of the *Atlas* (*b*), Lord Stowell speaks of a respondentia bond as a similar contract to a bottomry bond, only of rarer occurrence; and in *The Cognac* (*c*), Sir C. Robinson, in considering whether the Court had power to cut down an extortionate premium in a bottomry bond, said that he thought he might refer to the principles that had been held distinctly with regard to respondentia bonds as authorities equally just and necessary to be applied to cases of bottomry, and then proceeded to cite the opinions of foreign jurists speaking of the same point in respondentia. In *Glover v. Black* (*d*), respondentia interest was clearly recognized by the Court of Queen's Bench, as well understood to the law and to merchants. In *Busk v. Fearon* (*e*) there was a respondentia bond, and the Court certified to the Lord Chancellor that the holders of the bond had no lien at law on the goods; but that decision being founded upon common law, not upon Admiralty law, is no authority against the claim on present bond in this Court; and, moreover, the goods there sought to be charged were goods shipped long after the execution of the bond, goods shipped on the return voyage. In America the jurisdiction of the Court of Admiralty over respondentia is undoubted; *Franklin Insurance Company v. Lord* (*f*). Whatever authority, therefore, on the subject exists, is in favour of the Court's jurisdiction; and reason and policy point the same way. The general duty of the master to the cargo is described by Lord Stowell in *The Gratitude* (*g*). He there says, "Although in the ordinary state of things the master is a stranger to the cargo,

(*a*) Abbott, 150; Park on Insurance, 869; Marshall on Insurance, 742; Browne's Civil and Admiralty Law, II. 195; Maude and Pollock on Shipping, 288; Kent's Commentaries, III., 354.

(*b*) 2 Hagg. 58.

(*c*) Ibid. 387.

(*d*) 3 Burrows, 1394.

(*e*) 4 East, 319.

(*f*) 4 Mason, 253.

(*g*) 3 C. R. 240.

beyond the purposes of safe custody and conveyance, yet, in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law, unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care" (a). The master here was placed in a condition of necessity, and the hypothecation of the cargo, or the sale of part of the cargo, was his only resource. So in *Justin v. Ballam* (b), it is said, "Note, also, the master may hypothecate either ship or goods, for the master is intrusted with both, and represents the traders as well as owners of the ship."

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The *Queen's Advocate* and *Spinks* for the owners of the cargo.

1. The Court has no jurisdiction over respondentia; no such jurisdiction can be proved. The Court's jurisdiction over cargo in bottomry arises simply from its connection with the ship: apart from the ship the Court has nothing to do with cargo; nor has the master of the ship any right to hypothecate the cargo *per se*. 2. Before hypothecation the master was bound to have communicated with the owners of the cargo; *Oriental* (c); *The Bonaparte* (d). 3. Part of the property hypothecated has never been subject to maritime risk.

Deane, Q.C., in reply.

DR. LUSHINGTON:—[after stating the facts:]—I must first observe that the owners of the cargo have appeared absolutely to this action, and have not in their answer to the petition denied the jurisdiction of the Court over a respondentia bond like the present. When so important a question as the jurisdiction of the Court was intended to be put in issue, it should undoubtedly have been expressly raised in the pleadings. Still, if the want of jurisdiction were absolutely clear, I should hesitate to proceed with the cause, and I am therefore willing to consider whether a respondentia bond is capable of being enforced in the Court of Admiralty.

Judgment.

The general objection to the jurisdiction should have been taken in the first instance or pleaded.

I am very thankful to the counsel on both sides for their industry in searching for authorities, and citing them to the

(a) 3 C. R. 257.
(b) 1 Salkeld, 34.

(c) 7 Moore, P. C. 398.
(d) 8 Moore, P. C. 473.

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Court. I decline, however, entering into a minute examination of the cases, because none of them are so directly applicable as to govern my judgment, and, especially, because I think this case must be decided upon principle, and not upon chance observations made in cases very different in the most material facts.

Respondentia bonds rest upon the same principles as bottomry bonds, and can be enforced in the Court of Admiralty.

What is the difference between an ordinary case of bottomry and a case of respondentia? We all know it to be settled law, that a cargo with ship and freight may be hypothecated; we all know that necessity must exist in order to legalize such a transaction. The whole difference then in fact between respondentia and bottomry is this:—That in bottomry ship and freight are hypothecated as well as the cargo; in respondentia the cargo alone is hypothecated. It is the necessity and the maritime risk that give validity to a bottomry bond, and jurisdiction to this Court; and upon what principle then is it that this Court should not exercise similar jurisdiction in the case of respondentia, when the ship is lost, and there exists no other means of bringing the cargo to its destination? I think it is necessary to consider what the consequences must be, if, under circumstances of necessity, no valid respondentia bond could be granted. It is evident that in such a case the property must be sold, either in whole or in part, according to the emergency, the original intention of the owners disappointed, and it may be their interests completely sacrificed. The sale might take place, for instance, where there was no market for the goods, as in the case of fruit, or cargo, the product of the country where the shipwreck occurs. I am therefore of opinion that there is strong reason why, when circumstances require it, a respondentia bond given should be valid. Now this may be so, and yet this Court may have no jurisdiction, if it has no right to attach the property for the payment of the bond. I am not aware that any Court of equity or law can exercise that power, and if that be so, it is a mockery to say that such a bond may be granted, and the security not available. It is true, I believe, that no case precisely resembling this has ever occurred, but I am of opinion that this is occasioned by a difference of fact, and not a distinction of principle. I have jurisdiction over marine hypothecation, and the jurisdiction constantly exercised in bottomry is founded upon the same principles as those upon which jurisdiction is now claimed over respondentia. For this reason, and because there is no authority to the contrary, and because, if I were to repudiate jurisdiction, there might be a lack of justice to the holder of such a bond, and serious detriment to the interests of commerce, by

prohibiting this mode of relief in extraordinary exigencies, I pronounce for my jurisdiction over this bond.

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I will now consider the objections advanced to the validity of the bond. First. It is averred that Ames, who advanced the money, did not do so upon an undertaking to have a respondentia bond. But no evidence has been adduced in support of this averment.

Secondly. It is alleged that the cargo was hypothecated without the knowledge or consent of the owners, who resided at Liverpool. Now the principal owners of the Sultan resided at Boston; it is not alleged that the Sultan could have brought the cargo to this country, nor that any ship could have been obtained at Key West for the same purpose; and, in point of fact, the vessel procured, the T. J. Roger was chartered at Boston. The owners of the cargo were all resident at Liverpool, and in number at least twenty. The mode of communication suggested is, that Boston is 1,500 miles distant from Key West, and 200 miles from New York, and that steamers run from New York to Key West every fortnight, and make the voyage in seven or eight days. It is not stated that the owners of the cargo had any correspondents in the United States at all, and if any communication was to be had with them, it must have been between New York and Liverpool, and back from Liverpool to New York, and so to Key West. Now this would have been the shortest possible mode of communication,—much shorter indeed than was practicable, for the master could not reasonably have been expected to have made such communication without previous instructions from his owners, which would have occasioned further delay. I think it clear that answers could not have been obtained from Liverpool under less than three months, and then from whom? From the twenty owners of this cargo? or from how many of them?

Communication with the owners of the cargo being, under the circumstances, impracticable, the master was intitled by the policy of the law to give a respondentia bond.

I bear in mind the decision of the Judicial Committee in the case of the *Bonaparte* (a), declaring the obligation of the master to communicate with the owners of the cargo, if possible, before he grants a bottomry bond thereon, as well as the *Oriental* (b), in which the same doctrine was maintained. I know it to be my duty to be governed by those decisions, and I certainly shall not shrink from obedience to the rule so laid down. I am at the same time aware that Lord Cottenham, when Lord Chancellor, had previously, in *Glascott v. Lang* (c), come after con-

(a) 8 Moore, P. C. 459.

(b) 7 Moore, P. C. 398.

(c) 2 Phillips, 321.

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sideration to a contrary conclusion, and I believe that his judgment was not made known to the Judicial Committee. I am confident, however, that the Judicial Committee would never wish that the doctrine adopted by them should be carried to an extravagant extent, and I apprehend that to require communication to be held between Key West and Liverpool, and the twenty owners of this cargo, before any steps were taken for conveying it to its destination, would be carrying the doctrine to an extravagant extent, and beyond their Lordships' intention. For what would have been the inevitable consequences of such delay? The great expense and hazard of keeping the property in such a remote place as Key West, and then, even if orders could have been received from Liverpool, the great delay of executing them; and I might further inquire who was to be the person to protect the property in the interval, and carry such orders into execution. I dismiss, therefore, this objection of no communication.

The bond covering in part property not exposed to maritime risk is bad to that extent, but no further.

It is then stated on behalf of the opponents of the bond, that the bond in part covers property not exposed to maritime risk, namely, the part of the cargo which was shipped on board the *Otseonthé*. This is true; but this objection is not fatal to the whole bond, according to the well-settled principle of this Court, that a bottomry bond may be good in part, and bad in part. One further observation, in answer to the averment, that no advertisement for bottomry was made at Key West. I apprehend that it is perfectly preposterous to suppose that 28,000 dollars could have been advanced there.

The owners of the cargo brought home to pay a proportion of the bond only; the proportion that the value of the cargo brought home bears to the value of the cargo on which the bond was agreed to be given.

What, then, is the real justice in this case? I apprehend it to be that the owners of this cotton, the present defendants, should pay according to the value of the property brought home:—that is to say, that they should pay not the whole amount secured by the bond, but a proportion of that amount according to the value of the property delivered, and that the bondholder should seek his remedy for the remainder against the proceeds of the cotton at Key West. This, I think, is the justice of the case. By the judgment of the court in the United States, it is ordered that the proceeds of the cargo of the *Otseonthé*, amounting to 12,248 dollars, shall be paid to the bondholder, if, before the 25th of July of this year, it should not be shown that the bond has been paid, or security given to pay it. I cannot tell what has been done in this respect. I propose to pronounce for the bond, limiting the payment from the owners of the cotton at Liverpool as follows:—That they should pay

upon the bond whatever may be the amount thereof, in the proportion that the value of their property bears to the total value of the cargo upon which the bond was agreed to be given. That will be the principle governing my judgment; but it will probably be necessary to refer the calculation of exact amount to the Registrar. Assuming that the whole sum in the registry of the Court of Florida is paid over to Ames, he would still be a loser, but I am of opinion that he has no right to make the proprietors of the goods brought to Liverpool pay for losses sustained by the destruction of the cotton on board the *Otseonthe*. Nor have the proprietors of the cotton shipped on board the *Otseonthe*, so far as I am aware, any claim upon the Liverpool proprietors.

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The bondholders are intitled to their costs.

Rothery, proctor for the bondholders.

Pritchard for the owners of the cargo.

THE SEINE.

Collision—Reference to Registrar and Merchants—Excessive Claim—Insufficient Tender—Costs.

Where the amount of damage in a cause of collision is referred to the Registrar and merchants, and a tender is made by the defendant but not accepted by the plaintiff, if the amount pronounced to be due is less than two-thirds of the plaintiff's claim, but exceeds the tender of the defendant, the plaintiff is liable for the general costs of the reference, but the defendant for the costs occasioned by his making an insufficient tender.

THIS was a cause of collision. The owners of the *Seine* were condemned in the action, and the amount of damage sustained by the owners of the *Victory* referred to the Registrar and merchants. The *Victory* had been sunk by the collision in the river Thames, but was raised, at the expense of the owners, brought to London and sold by public auction: the owners bought the ship in for 215*l*. In the registry they stated their amount of damage to be 2,506*l*. 13*s*. 7*d*. The owners of the *Seine* tendered 1,100*l*., which was refused. The Registrar and merchants, in assessing the damage, estimated the value of the

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Victory, when run down, at 1,400*l.*; the costs of raising her, and other expenses, at 309*l.* 0*s.* 5*d.*; and, deducting from the aggregate of these two sums 215*l.* as the final value of the ship, pronounced the sum of 1,494*l.* 0*s.* 5*d.* to be the amount of damage actually sustained.

Robinson now moved the Court to condemn the plaintiffs in the costs occasioned by the claim for damages and the proofs in support thereof, and in the costs of the reference. He referred to the *Eliza (a)*.

Deane, Q.C., opposed the motion.

DR. LUSHINGTON:—It is perfectly clear that more than one-third has been struck off the claim of the plaintiffs by the Registrar and merchants: by the settled rule of the Court, therefore, the plaintiffs must be condemned in the general costs of the reference. But it also appears that an inadequate tender was made by the defendants, and they must pay the costs occasioned thereby. And as the defendants, by making an inadequate tender, in some degree rendered an appeal to the Court necessary, I shall not allow them the costs of this motion.

Deacon, proctor for the owners of the *Victory*.

Toller for the owners of the *Seine*.

THE AFINA VAN LINGE.

3 & 4 Vict. c. 65, s. 8—*Necessaries supplied out of Jurisdiction*
—*Action by Default—Unopposed Motion for Payment.*

In an action of necessaries, where necessary monies were advanced by merchants in this country to a foreign ship, partly when the ship was lying in a port of refit out of the jurisdiction of the Court, and partly upon her arrival in England, and the action goes by default, and the owners do not appear to oppose the motion to the Court to order payment out of the proceeds of the ship in the registry, the Court will make the order.

THIS was an action for necessaries. In May, 1859, the *Afina Van Linge*, a Dutch vessel, then on her voyage from Venice to Liverpool, received damage, and put into the

harbour of Stornoway, in Scotland, to refit. The master (who was also sole owner) applied by letter to Messrs. Vos Browne and Company, of Liverpool, the brokers of the ship, to advance the necessary funds, and they remitted him a sum of 200*l*. The vessel, having refitted, prosecuted her voyage and arrived in Liverpool; and Messrs. Vos Browne and Company then advanced a further sum of 105*l*. 15*s*. to defray port charges and other necessary expenses, making in all 305*l*. 15*s*. This sum being only partly repaid, Messrs. Vos Browne and Company arrested the ship in an action for necessaries. The action went by default; the ship was sold and the proceeds paid in the Registry, and the Surrogate, by interlocutory decree, pronounced a balance of 186*l*. 19*s*. 3*d*. to be due to Messrs. Vos Browne and Company, the plaintiffs.

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Twiss, Q.C., now moved the Court to order the balance so pronounced due to be paid out to the plaintiffs. The motion was not opposed.

DR. LUSHINGTON:—The money, forming this claim, was not advanced wholly in Liverpool, but partly in Stornoway, a place without the jurisdiction of the Court. It must be well understood that if such a motion was opposed the Court would have considerable difficulty in making the order. But as on this occasion the shipowner has not interposed to protect his interest, I shall grant the motion, and I order the money to be paid out as prayed.

Tebbs, proctor for the plaintiffs.



H.M.S. HIMALAYA.

Salvage—Proportion awarded—Distribution.

THIS was an action of salvage by the owner, master and crew of the *Gauntlet*, for services rendered to her Majesty's steamship *Himalaya*, in the following circumstances:—

On the 6th of April, 1857, H.M.S. *Himalaya*, under command of Captain Haswell, left England with 790 men, besides officers, of her Majesty's 90th Regiment of Foot, and other officers, destined for Hong Kong, in China. In the prosecution of the

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voyage the ship was, on the 5th of July, off Angier, on the coast of Java, when a despatch from Sir William Hoste, the senior officer at Singapore, dated the 4th of June, was delivered from H.M.S. *Actæon* to Captain Haswell, directing him to proceed with the utmost dispatch to Singapore. The Indian mutiny had broken out in the previous May. In pursuance of the order the *Himalaya* was proceeding the following day, the 6th of July, through Banca Straits, with all speed, about thirteen knots an hour, when about 4.40 P.M., the ship suddenly grounded on a mud-bank off Vierde Point, distant about one or two miles from the shore. Two anchors were immediately laid out nearly astern, and preparations made for lightening the ship after her purchases should be hove taut. At this time the *Gauntlet*, which had been spoken by the *Himalaya* that afternoon, was coming up the Straits, distant about three or four miles; and Captain Haswell sent an officer in a boat with directions to the *Gauntlet* to anchor as near as possible to the stern of the *Himalaya*, for the purpose of rendering assistance in heaving her off. The *Gauntlet* accordingly proceeded forthwith towards the *Himalaya*, and, anchoring with both bower anchors about a cable's length off, veered upon her anchors till her stern was brought to a short distance from the bank. A coir hawser of the *Gauntlet* was then taken out to the *Himalaya*, one end secured there and the other brought to the *Gauntlet's* capstan; and a hawser from the *Himalaya* was made fast to the *Gauntlet's* stream-chain (which was passed in two parts round the *Gauntlet's* mainmast and the bights out of each of her quarters) and taken to the *Himalaya's* capstan; and a strain hove upon them by the crews of both ships: but the tide rapidly falling, it was found impossible to get the *Himalaya* off, and operations were discontinued for the night. The next morning, at low water, the *Himalaya* was found to be lying on the outer edge of a mud-bank, cradled in the mud. Captain Haswell and the master of the *Gauntlet* held a conference together, and it was agreed that the *Gauntlet* should wait by the *Himalaya* to assist in further efforts to heave her off at high water; and it was proposed by the master of the *Gauntlet*, that if these efforts proved unavailing the *Gauntlet* should take the troops on board and proceed to Singapore. In the course of the day eighty tons of water were started on board the *Himalaya*; fifty to sixty tons of coals carried out in boats and thrown into the sea, and the two starboard boilers blown out. The tide in Banca Straits only rising and falling once in the twenty-four hours, about 5.30 P.M., steam was got up on board the *Himalaya*, and about 6.30 P.M., it being then within an hour and a-half of high water, the crew of the *Gauntlet* hove on their bower anchors, and the crew of the

Himalaya on both the hawsers; but the only apparent result was to draw the Gauntlet so close upon the bank that she touched occasionally with her stern. Upon the representations of the master, therefore, the heaving was discontinued, and a boat's crew was sent from the Himalaya to assist the crew of the Gauntlet in slipping the hawsers and getting the Gauntlet into deeper water. It was then about eight o'clock, and very nearly high water. At the top of the tide the Himalaya, being rolled by the men on board, and heaving on the anchors astern, with the assistance of the crew, came off the bank stern foremost: in doing so she passed dangerously near the Gauntlet. It was alleged by the salvors, that shortly before the Himalaya came off the heaving on the hawsers was renewed, and the Himalaya was thereby assisted in the very act of getting off; but this was denied on the part of the Himalaya, and it was alleged that the hawsers had been cast off half-an-hour before. On the next day, the 8th July, the Himalaya recovered her anchors and proceeded to Singapore, where she arrived the following day, without having received the slightest injury. From Singapore she proceeded with the troops to Calcutta. The value of the Gauntlet, freight and cargo, at the time of the services rendered, was 48,191*l.*; the value of the Himalaya, with her engines, stores and goods, 107,497*l.*

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Twiss, Q.C., and Wamsey for the salvors.

The *Queen's Advocate* and the *Admiralty Advocate* for the Admiralty.

DR. LUSHINGTON :—The first point in issue is, How did the Himalaya come off the bank? Upon the evidence I have come to the conclusion that the Gauntlet was not at that time attached to the Himalaya, and was, therefore, not immediately instrumental in getting her off. But this does not close the case of the salvors. For it does not appear but that the Himalaya must have been loosened in her position by the previous efforts of the Gauntlet, and was so ultimately enabled to work off the bank. I feel myself at liberty to conclude that important and effectual salvage services were rendered by the Gauntlet and her crew, for which I must award fit remuneration. The Himalaya was certainly in considerable danger; the Gauntlet also, I think, was in some danger, though not very much. I award to the salvors 2,000*l.* Then, as to the distribution of this sum, which I am asked to direct. The ship contributed most effectually to the service and encountered some peril thereby; the owner, therefore,

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ought to receive a large share of the salvage. The master also should be well rewarded for taking upon himself the responsibility of suspending his voyage and risking the property of his owner. To the owner I award 1,000*l.*; to the master 500*l.*; the remaining 500*l.* to the crew.

Clarkson and Son, proctors for the salvors.

The *Admiralty Proctor* for the Admiralty.

THE VORTIGERN, *MACINTYRE*, Master.

Collision—Preliminary Acts—Cross-Action.

An application to amend a mistake in a preliminary act must be made immediately upon discovery, and must be supported by affidavit.

Where in a cause of collision there is a cross-action, and both come on to be heard together by consent of proctors, the Court decides in the cross-action according to the facts pleaded and proved in the original action.

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THIS was a cause of collision, in which the action and cross-action came on to be heard together, by consent of proctors. It is unnecessary to report the facts.

Deane, Q.C., and *Spinks* for the Kepler.

Twiss, Q.C., and *Waddilove* for the Vortigern.

DR. LUSHINGTON, in the course of his summing up to the Trinity Masters, said:—I wish now to call your attention to the preliminary acts. Preliminary acts were instituted for two reasons,—to get a statement from the parties of the circumstances *recenti facto*, and to prevent the defendant from shaping his case to meet the case put forward by the plaintiff. In practice they have been found very useful; and neither party is allowed to depart from the case he has set up in his preliminary act. Some of the facts stated in the preliminary act are facts absolutely within the knowledge of the party making the statement, some are matters of opinion only. The Court will expect correctness where correctness is in the power of the party. In the present case, it is urged by Dr. Twiss, on the part of the Vortigern, that there is a mistake, an inadvertent mistake, in

the 6th article of her preliminary act. He says, that the direction of the Kepler's head, therein described as south-east, should have been described as south-by-east. But this mistake, if mistake it be, cannot be rectified now. It is too late. Mistakes, we know, will creep in; but as soon as the mistake was discovered, an application should have been made to the Court, upon affidavit, for leave to amend. I cannot amend now, at the last moment, on the mere statement of counsel.

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The Court found the Vortigern solely to blame for the collision. DR. LUSHINGTON then said :—

In the cross-action brought by the Vortigern I dismiss the action. It may sometimes happen that the decree in the cross-action will not be the exact reverse of the decree in the first action; as where, in the first action, the plaintiff fails only because the burden of proof is upon him, and he cannot make out his case affirmatively, the defendant in his cross-action will not therefore be intitled to judgment, for neither will he have succeeded in proving his case. The present is not a case of this kind. The Vortigern is solely to blame, and loses in both actions. The minute of Court entered into by the proctors enables the Court to pronounce according to the facts pleaded and proved in the first action, and not merely according to the decree.

Rothery, proctor for the Kepler.

Clarkson for the Vortigern.

THE LIVINGSTONE, COOK, *Master*.

Collision—No coloured Lights—17 & 18 Vict. c. 104, ss. 295, 298—Admiralty Regulations, 1858.

- A British vessel not carrying the coloured lights appointed by the Admiralty Regulations is guilty, *prima facie*, of a violation of the Regulations, and to escape the legal consequences must prove it to have been impracticable to have done so.
- Where it is alleged that it was impracticable to carry the coloured lights fixed, on account of the sea, the question referred to the Trinity Masters.
- A British vessel neither carrying nor exhibiting the coloured lights, such default occasioning the collision, condemned in the damage.

COLLISION. This was an action brought by the owners of the British barque *Christina*, against the British brig *Livingstone*. There was also a cross-action by the *Livingstone*. The

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collision took place at 4.35 A.M., on the 14th of October, 1858, between Cape Trafalgar and Cape St. Vincent. Neither vessel carried the coloured lights required by the Admiralty Regulations of 24th of February, 1858. The *Christina* carried a signal lantern at her bowsprit, which was seen by the *Livingstone* at the distance of a mile and a half. The *Livingstone* alleged that she carried a similar light, and also showed a bright light on the port quarter; but it was alleged on the other side that she neither carried nor showed any light whatever, and that she was not discovered until within a cable's length, when it was impossible to prevent the collision.

The second and third of the Admiralty Regulations (24th of February, 1858), applicable to sailing vessels, are as follows:—

“ 2. The coloured lights shall be fixed, whenever it is practicable, so to exhibit them; and shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent the lights from being seen across the bow.

“ 3. When the coloured lights cannot be fixed (as in the case of small vessels in bad weather), they shall be kept on deck between sunset and sunrise, and on their proper sides of the vessel, ready for instant exhibition, and shall be exhibited in such a manner as can be best seen on the approach of or to any other vessel or vessels, in sufficient time to avoid collision, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.”

The *Livingstone* was of 255 tons burden; and it was admitted that a gale of wind was blowing, and a heavy sea running. The master of the *Christina* alleged that he had endeavoured in vain to procure the coloured lights at Malta.

The *Admiralty Advocate* and *Deane*, Q.C., for the *Christina*.

Twiss, Q.C., and *Waddilove*, for the *Livingstone*.

DR. LUSHINGTON summed up to the Trinity Masters:—The *Livingstone* was guilty *prima facie* of violating the Regulations in not carrying the coloured lights *fixed*, and to escape from the legal consequence is bound to prove sufficient exonerating circumstances. It is a question for you to consider whether it was not practicable for the *Livingstone* to have carried the coloured lights *fixed*. But in any case the *Livingstone* has violated the Regulation in not keeping the coloured lights on deck, and in

not exhibiting them. If such violation of the Regulation has in any degree contributed to the collision, the Livingstone is barred by the statute from recovering in her action, and in the action of the Christina is liable for the whole damage, unless the Christina has been likewise guilty of a violation of the statute, which contributes to the collision. It is immaterial, however, that the Christina did not carry or exhibit the coloured lights, as it is admitted that she was seen at the distance of a mile and a half.

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The learned Judge then submitted the other evidence in the case to the Trinity Masters, who were of opinion that the Livingstone had exhibited no light at all, that this occasioned the collision, and that the Christina was not to blame.

The learned Judge then condemned the Livingstone in the whole damage.

Stokes, proctor for the Christina.

Waddilove, proctor for the Livingstone.



THE SCHWALBE, — HASSE, *Master*.

Collision—Extra-articulate Evidence—Exceptive Allegation—Practice.

The Court will not encourage objections to the reception of evidence as extra-articulate.

Evidence pertinent to the issue, objected to as extra-articulate, admitted, the other party having leave to counterplead and produce evidence in reply.

THIS was a cause of collision brought by the owners of the brig Crown against the screw-steamship Schwalbe. The libel of the Crown charged the Schwalbe with starboarding before the collision, which was denied in the allegation of the Schwalbe: the libel did not plead any words spoken at the time of the collision on board the Schwalbe. The evidence was taken by deposition before an examiner of the Court. The witnesses for the Schwalbe were examined first. On cross-examination the pilot was asked, if on the vessels clearing he had stamped his foot on the deck, and in the presence of the master and crew of the Crown exclaimed, "Damn it, the helm's to starboard again,"

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or anything to that effect, and he denied it. The master of the *Schwalbe* was also cross-examined on the point, and gave the same denial as the pilot. Subsequently one of the witnesses in support of the libel, an able seaman of the Crown, in his examination in chief, having stated the circumstances of the collision, and that after the steamer was cut clear of the brig she backed away, went on to depose as follows :—" And as she was so backing, the pilot of the steamer, who was on the bridge, stamped his foot and said, ' The damned helm is still astar-board.' All our hands were up on the bridge with him at the time that he said this."

The proctor for the *Schwalbe* objected to this being taken down by the examiner, on the ground that it was extra-articulate; but the evidence was, nevertheless, taken by the examiner. An exceptive allegation was then brought in on the part of the *Schwalbe* against the reception of this evidence, which, by direction of the Court (a), stood over until the printing of the whole evidence of the case was completed. The evidence having been printed, the question was now argued.

Twiss, Q.C., against the admission of the evidence.

The evidence is clearly extra-articulate. The libel does not plead any such words being spoken; and it is clear that, if they were so spoken and heard, they might and ought to have been pleaded. The practice of this Court requires that the whole case should appear on the pleadings. This portion of the evidence, therefore, is inadmissible.

Deane, Q.C., *contra*.

It is true that the evidence is extra-articulate, but it does not follow that therefore it should not be admitted. The pleadings are for the satisfaction of the Court, and to give fair notice to the other side of the case they must be prepared to meet; they are not to contain all the evidence. Formerly, when there was no opportunity of cross and re-examination, it might have been more necessary to confine the evidence to the pleadings, as injustice might otherwise have been done; but that reason does not obtain now. The defendants have had the opportunity of obtaining the denial of the pilot, and have obtained the denial, and they are intitled to no more. The plaintiffs, on the other hand, having asked the question in cross-examination of the wit-

(a) *Ante*, p. 461.

ness, have a right to produce evidence to contradict him; the fact alleged and denied being part of the *res gestæ*, and clearly relevant to the issue: or, indeed, in order to discredit his particular statement; *Taylor on Evidence* (2nd edition, p. 1143). The rule is thus stated by Alderson, B., in the case of the *Attorney-General v. Hitchcock* (a):—"A witness may be asked any question, which, if answered, would qualify or contradict some previous part of that witness's testimony given on the trial of the issue; and if that question is so put to him, and answered, the opposite party may then contradict him: and for this simple reason, that the contradiction qualifies or contradicts the previous part of the witness's testimony, and so removes it."

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DR. LUSHINGTON:—Exceptive allegations have been of very rare occurrence in this Court: I only remember three or four in the course of the last thirty years, and the Court is not inclined to encourage them. Where the evidence objected to is impertinent to the issue as well as extra-articulate, the Court, if called upon, would not retain it; but where the extra-articulate evidence is pertinent to the issue, and especially where, as in the present instance, it forms part of the *res gestæ*, the Court would be most reluctant to exclude it. The Court will not shut its eyes to the truth; but, on the other hand, if the opposite party has been surprised, and desires an opportunity of meeting the extra-articulate evidence, the Court will give leave to counterplead and produce evidence on the counter-plea.

Judgment.
The Court reluctant to exclude evidence pertinent to the issue.

This has been the practice of all Courts using libel and allegation, and was very frequently followed in the Ecclesiastical Courts in causes where the sanity of the testator was in issue; it was found impossible to state, in the first instance, all the facts and circumstances bearing upon that most complex question. A somewhat similar reason obtains, in many causes of collision, for admitting extra-articulate evidence. The collision takes place at night, in darkness, and many important facts which bear upon the collision taking place on board one ship are unknown on board the other. Thus it cannot be known on board one ship what orders were given on board the other; what words passed; what look-out was kept, and so on. If these are discovered subsequently to pleading, there can be no wrong done in admitting evidence of them, if the other party has opportunity of giving his contradiction. I think it is the duty of the Court not to encourage objections to evidence as extra-articulate, even if by the exercise of diligence it might have been obtained and

1859.

December 1.

Evidence admitted with leave to the other side to counterplead.

pleaded in the first instance. In this I have the authority of Lord Stowell, who, in the case of the *Harvey* (a), says thus:—"On the part of the captain there are several witnesses, and among them Mr. Evans, whose testimony alone, if true, is decisive upon the subject: and I do not think it a sufficient objection to his testimony that his conversations with the captain in respect to this young man are not to be found in the allegation as well as in his evidence; that is a technical objection, not to be too strictly applied." In the present case the objection has far less weight, both on account of the description of the evidence, and because the party objecting has had opportunity to contradict in cross and re-examination. I shall direct the evidence to be admitted; the proctor for the *Schwalbe* may, if he thinks fit, bring in a counter-plea and produce evidence upon it.

Deacon, proctor for the Crown.

Clarkson for the *Schwalbe*.

THE JONATHAN GOODHUE, — JONES, *Master*.

*Wages of Foreign Master—Bottomry Debt—Priority—17 & 18
Vict. c. 104, s. 191.*

The master of a foreign ship having, in the terms of a bottomry bond, bound himself as well as the ship and freight, cannot enforce his lien for wages against the claim of the bondholder.

The *Milford* (b) confirmed.

Semble. A mariner's wages, earned before the execution of a bottomry bond, postponed to the bond.

December 22.

THIS was an action by the master of the American ship Jonathan Goodhue, praying payment of 550*l.*, the balance of his wages, out of the proceeds of ship and freight remaining in the Court. It was opposed by the holders of a bottomry bond, executed by the master now suing, on ship, freight and cargo, which had been pronounced valid against ship and freight and invalid against the cargo (c): they alleged that their claim amounted to 2,868*l.* 15*s.*, besides interest; that the proceeds of ship and freight amounted only to 2,221*l.* 8*s.* 2*d.*, and that they were intitled to priority over the master's claim for wages, or, at

(a) 2 Hagg. 83.

(b) Ante, p. 362.

(c) Ante.

least, over his claim for wages earned before the execution of the bond.

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December 22.

The *Admiralty Advocate* and *Robinson* for the bondholders.

Admitting that, according to the *Milford* (a), the master of a foreign ship is intitled to sue for his wages in this Court, he cannot do so against the holders of a bond which he has himself executed. The form of the bond shows this conclusively. The master binds himself personally for the repayment of the money borrowed on bottomry. No equitable construction can defeat an obligation so absolute. The obligation is not a matter of form, it is of the essence of the contract; it occurs in every bottomry bond, forms part of the security to the lender for advancing his money, and operates as a safeguard to the owner that the master shall not pledge his property without necessity. In *Abbott on Shipping* (b), it is said, "The remedy of the lender is against the master of the ship." And in *The William* (c), where the master, who was also a part-owner, had given a bond, this Court said, "The master giving the bond becomes a debtor to the lender in a double capacity, for both personal credit is pledged and the ship is hypothecated:" this dictum is not rendered inapplicable by the master, in this case, not being a part-owner. The master has also, by the bond, which is his own act and deed, pledged the freight to the lender without reservation; it is a violation of his contract now to claim a lien on the freight to satisfy his private debt. He has, moreover, another remedy by personal action in his own forum against his owners; but the bondholders have no other source of payment. Even if the bondholders have not an absolute preference over the master, they are intitled to priority over his claim for wages earned previously to the execution of the bond; *Abbott on Shipping* (10th ed. pp. 532, 533); *Selina* (d).

Addams, Q.C., and *Wambey*, for the master.

Seamen's wages have always been favoured by the Court; *Madonna D'Idra* (e); and by the Merchant Shipping Act masters have now the same remedies as seamen. No distinction can be made between wages earned before and wages earned after the bond; the services of the master are continuous and indivisible. There is no case in which a seaman's wages have been postponed to a bond. The master does not curtail his own

(a) Ante, p. 362.

(b) 10th edition, p. 116.

(c) Ante, p. 346.

(d) 2 N. of C. 18.

(e) 1 Dodson, 37.

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rights by signing the bond. He really signs in the interest of his owner and for his owner, and where an agent contracts for his principal the principal alone is liable. The words of the bond, whereby the master binds himself, are formal merely, and should receive an equitable construction. It is notorious and manifest from the very term, that in bottomry transactions the real security is the bottom of the ship. But even if the master is personally responsible, it is not here but in a Court of law; and if not responsible here directly, he cannot be made responsible indirectly. In point of fact the master, when he signs a bond, never intends to give up his remedy for his own wages; and it would be a hardship if the law took away his remedy from him. It would also be highly injurious to commerce; for masters would be unwilling to take up money on bottomry, although the interest of their owners required it.

Judgment.

DR. LUSHINGTON:—It is unfortunately incidental to this case that one of two innocent parties must suffer. It is certainly a case *primæ impressionis*; none similar, however, has ever come under the consideration of the Court.

The master
sues under the
Merchant
Shipping Act,
1854.

It is most necessary to bear in mind who are the parties in this cause. They are the master of a ship and the holders of a bottomry bond. If the case were one of a master proceeding against the owner, or against proceeds in the registry claimed by the owner, very different considerations would apply. The master sues by virtue of the statute, the Merchant Shipping Act, 1854, s. 191. Whatever may have been the American law, this Court, previous to the statute, had no jurisdiction in respect of a master's wages. But now the master has, by virtue of the statute, "so far as the case permits,"—and these are not unimportant words,—"the same rights, liens and remedies for the recovery of his wages as any other seaman."

Case of the
Milford.

When this case was first brought before the Court, it was said that the American law would exclude the master from the benefit of the statute,—that it was a legal incident of the contract that the master should have no lien on either ship or freight for wages or advances. But, pending that question, the Court decided, in the case of *The Milford*, that the remedy must follow the *lex fori*, and that a foreign master was intitled to the same remedy against ship and freight as a British master. I adhere to that judgment, though I repeat what I then said, that it was a case of great doubt and difficulty. If the present case, therefore, had gone no further, I should have decreed payment to the master.

But since that time the bondholders have raised a new objection, which is stated in the present act on petition. It is there alleged for the bondholders that "they have no other security than the proceeds for the amount due to them on the bond, and will be unable, in any case, to recover a large portion of that amount, and that any wages recovered by the master out of the proceeds will, to that extent, increase the loss to them;" and further, that "the greater part of the wages sued for by the master were earned by him before the execution of the bond;" and the Court is then prayed to direct the proceeds to be paid out to the bondholders. But the main objection to the master's claim is not explicitly stated. It should have been stated what the contents of the bond were; that by the terms of the bond the master had bound ship and freight, and had rendered himself personally liable for the money advanced by the bondholders, and, consequently, could not put his lien in competition with their claim. However, the question is substantially raised by the concluding prayer, and has been directly submitted to the Court in argument. The counsel for the bondholders now contend that the lien of the master for his wages and advances cannot operate to the injury of those to whom he had made himself personally responsible, and to whom he had hypothecated the very fund from which he now seeks preferential payment.

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December 22.

The question turns on the terms of the bond.

The other side rely on the master's lien for wages as absolute, like any other mariner's, against the ship and freight. But the question is not whether the master has lost his lien upon ship and freight, but whether he can enforce that lien against the interest of the bondholder. As to wages generally, seamen, no doubt, are generally intitled to a priority of payment; but even here difficulties might arise, and the Court has guarded against expressing any opinion in case of wages earned before the execution of a bond or on a previous voyage; and I wish to state that this is an undecided point, possibly of great difficulty, and that certain complications might give the Court much trouble in determining the rights of the parties.

As against the bondholders the master is in a different position from other seamen.

I must now advert to the terms of the bond. Is the master a debtor for the money advanced on bottomry? This is the important fact on which the question of law must turn. The words of the bond are these:—"And I do hereby bind myself, my heirs, executors and administrators, and my lands, tenements, goods and chattels, and especially the said barque or vessel, with her tackle, apparel, boats, oars and appurtenances; and also the said goods, and the freight which is or shall become due and

The master has made himself, by the bond, a debtor to the bondholders;

1859.

December 22.

payable in respect thereof, to secure and pay," &c. I am urged to put an equitable construction on these words. I am desirous of so doing; but if I did not hold that the master, by these terms, bound himself for the payment of this money, I should not be putting an equitable construction upon these words, I should be obliterating them from the bond altogether. I apprehend no Court, pretending to administer justice, ever took upon itself to expunge from a bond words so clear, so perfectly free from ambiguity, as these. The next question is, whether the Court is at liberty to say, that though they clearly import that the master is bound to make the payment, yet that they are void and of no effect. It is said that the obligation is inoperative, because the master received no consideration. But it is clear that the master did receive consideration. He is intitled to receive money from the owner for the completion of the voyage, which, without the bottomry bond, might never have been completed. Again, it has been said that the master acted merely as agent, and that what he did as agent does not bind him but only binds his principal. But how is that applicable here, where the master expressly binds himself, and cannot, by the well-known rule of bottomry law, bind the owners personally at all. Lord Tenterden expressly says, as has been quoted by the Admiralty Advocate, "The remedy of the bottomry-lender is against the master." It is true that in many cases no proceedings are taken against the master,—for a very good reason, that he is generally incompetent to pay; and it may be true that this Court has no direct jurisdiction against him upon the bond, though I give no opinion on this point; but that he is liable somewhere I entertain no doubt. The master has, moreover, hypothecated by his own act the ship and freight as security for the money advanced. How, then, can I allow this man, who is personally liable to the bondholders, and who has made over to them the very property against which he raises a claim, to say, "I will take that property out of your hands, for my benefit and to your injury?" I am of opinion that I should be acting contrary to every principle of law and equity were I to do so; and further, I think I might subject the Court to an injunction, and, perhaps, to a foreign attachment. I direct the proceeds to be paid out to the bondholders; but certainly this is not a case for the Court to give costs.

and has
pledged the
fund he now
seeks to resort
to.

The proceeds
must be paid
out to the
bondholders;
but no costs
allowed.

Bathurst, proctor for the bondholders.

Rothery for the master.

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- sion of a ship's launch, those in charge of the launch are bound to give the customary notice; if there is no custom, then reasonable notice. Reasonable notice, in such circumstances, considered. The party launching must prove that such notice was given. Vessels navigating the river are bound to observe reasonable signals of an intended launch. *Vianna*. Page 405
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3. Where the Plaintiff's vessel is much injured by a collision abroad, and the master acting as a prudent owner uninsured, sells the ship in preference to repairing, the owner recovering for the damage, is intitled to the full value of the ship less the proceeds of the sale, and to interest from the date of the collision. *South Sea.* 141
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8. Compensation allowed for the non-employment of the ship during repair, consisting of the expenses of detention, and the amount of profit lost. *H.M.S. Inflexible.* 200
9. Peculiar expenses arising from the custom of the trade in which the ship was employed, allowed for. *Ibid.*
10. Plaintiff intitled to recover for subsequent damage caused by the collision (as going on shore), unless the Defendant proves that such damage might have been avoided by the exercise of common care and skill. *Pensher.* 211
11. Plaintiff intitled to recover for salvage expenses incurred, unless Defendant proves them to have been incurred unnecessarily. *Linda.* 307

- Plaintiff not intitled to recover for salvage expenses incurred by his crew abandoning the vessel after the collision, in consequence of the want of ordinary nautical skill and resolution. *Linda*. Page 307
12. Plaintiff intitled to recover the salvage money paid by him by decree of the Court in respect of services rendered necessary by the collision, and also the costs of the salvage action, although he made no tender. *Legatus*. 168
13. Plaintiff intitled to recover in full a charge (as for towage) rendered necessary by the collision, which might probably, but would not necessarily, have been incurred if there had been no collision. *H.M.S. Inflexible*. 200
14. In a cause of damage against a foreign ship, brought by the owners of a British ship, and foreign owners of cargo, the bail are only liable to the extent of the value of the ship and freight, although the damage and the sum in which bail was given exceeds that value. *Duchesse de Brabant*. 264

XV. PRACTICE.

1. A cross-action may be instituted after judgment given in the original action. *Calypso*. 28
2. Where, in an action of collision, a decree has been made of both vessels to blame, the Court will not refer the damage of both vessels to the Registrar, but will leave the Defendant to his cross-action, although the Plaintiff resides out of the jurisdiction, and his ship perished in the collision. *North American*. 466
3. Where there is a cross-action, and the action and cross-action come on to be heard together by consent of proctors, the Court decides in the cross-action according to the

facts pleaded and⁴ proved in the original action. *Vortigern*. Page 518

4. Two actions by different Plaintiffs against a British ship in respect of one collision; bail given in both actions; agreement between second Plaintiff and Defendant that the decree in the second action shall follow the decree in the first action; damage pronounced for; value of the ship paid into Court. The first Plaintiff is intitled, if no application has been made by the second Plaintiff before the hearing for an equitable decree, to priority of payment in full. *Clara*. 6

But if, before the hearing, such an application has been made by the second Plaintiff, the Court will pronounce an equitable decree,—if in favour of the damage, for an apportionment of the money under the hand of the Court between the Plaintiffs,—if against the damage, for an equitable payment of the costs between the Plaintiffs. *Ibid*. 6, 7

Semble. Where there are several actions by different Plaintiffs against a British ship in respect of one collision, and the owner gives bail in all the actions, and does not obtain protection from the Court of Chancery under 17 & 18 *Vict.* c. 104, s. 514, each of the actions may be prosecuted to execution. *Ibid*. 4, 7

5. The Plaintiff failing to prove the identity of the ship proceeded against, is not liable for damages occasioned by the arrest of the Defendant's ship, unless the arrest was made *malâ fide*, or with *crassâ negligentia*. *Evangelismos*. (P. C.) 378
6. Action entered in name of beneficial, not registered owner, damage pronounced for:—*Held*, on mo-

tion to dismiss the Defendant, that the reference should be proceeded with, and the amount reported due be paid into the Registry; the Plaintiff to be put, if necessary, to make out his title. *Ilos.* Page 100

7. An application to amend a mistake in a preliminary act must be made immediately upon discovery, and must be supported by affidavit. *Vortigern.* 518

8. The Court will proceed secundum allegata et probata, even though entertaining some doubt whether, in so doing, it will arrive at the real truth and justice of the case. *North American.* (P. C.) 358

The party suing, therefore, cannot recover in full, if he fails to prove the case set up in his pleading and evidence, although no fault be proved against his vessel, and fault is established against the other vessel. *Ibid.*

9. *Semble.* A defence in law not raised in the pleadings cannot be afterwards relied upon at the hearing. *Scine.* 411

CONFLICT OF LAWS.

See FOREIGN SHIP.

COSTS.

Costs will be given against a Queen's ship pronounced in fault. *H.M.S. Swallow.* 32

See APPEAL, II., III.

COLLISION, IX., 5, XIV., 12, XV., 4.

SALE OF SHIP, 5.

SALVAGE, I., IV., 20, 21.

COSTS AND DAMAGES.

See SALE OF SHIP BY MASTER

ABROAD, 4, 5.

SALVAGE, IV., 8, 9.

SLAVE-TRADE.

WRONGFUL ARREST.

CROSS-ACTION.

See COLLISION, XV., 1, 2, 3, 8.

DAMAGES, MEASURE OF.

See COLLISION, XIV.

SLAVE-TRADE.

DAMNUM ABSQUE INJURIA.

See WRONGFUL ARREST.

DEMURRAGE.

See COLLISION, XIV.

SLAVE-TRADE.

DERELICT.

See SALVAGE, II., 6, 7, IV., 15.

DETENTION FEES.

Where a vessel is arrested in an out-port, and not by the marshal of the Court, the detention fees are to be paid by the party arresting, though successful in the cause. *North American.* Page 466

EVIDENCE.

See COLLISION, XII.

REGISTRAR, 2.

EXCEPTIVE ALLEGATION.

1. Exceptive allegation, and the examination of witnesses thereon, suspended until the printing of the evidence in the principal cause. *Schwalbe.* 461

2. The Court will not encourage exceptive allegations. *Ibid.* 521
Evidence pertinent to the issue, excepted to as extra-articulate, admitted; the other party having leave to counterplead and produce evidence in reply. *Ibid.*

FOREIGN JUDGMENT.

A Defendant relying on the judgment of a tribunal summoned by a foreign Consular Court as a bar to the Plaintiff proceeding here, is bound to prove that the tribunal

had jurisdiction by treaty, usage, or voluntary submission. *Griefswald*. Page 430

FOREIGN SHIP.

1. In a collision between a British ship and a foreign ship on the high seas, the duty and right of both parties are to be determined by the law maritime. *Dumfries*. 64
Zollverein. 96
2. The 297th section of the Merchant Shipping Act, 1854, which prescribes that every steam-vessel navigating any narrow channel shall keep to the starboard side of the fairway, may be restricted by the 291st section from applying to foreign steam-vessels navigating the Thames; but a customary course of navigation for all steamships on the river will be presumed to have emanated from the statute, which custom every foreign steam-vessel is bound to know and obey. *Fyenoord*. (P. C.) 374
3. The owners of a foreign vessel are intitled to claim the benefit of s. 388 of the Merchant Shipping Act, 1854. *General de Caen*. 10
4. The Court of Admiralty has jurisdiction over an action brought by the owner of a British ship against a foreign ship for a collision in foreign waters. *Griefswald*. 430

FORFEITURE OF WAGES.

See MASTER'S WAGES, IV.

FOUL BERTH.

See COLLISION, X.

FREIGHT.

Where a ship is arrested in an action against ship and freight, and a party *primâ facie* intitled to the freight, as a mortgagee in possession, appears to the action, he is

not required to bring the freight into Court, but is intitled to a release of the ship, upon giving bail in the action. *Ringdove*.

Page 310

Freight *pro rata itineris peracti* is not due, unless there has been an acceptance of the goods at the shorter destination, such that the law will imply a new contract. *Newport*. 335

GARNISHEE ORDER.

Payment under a garnishee's order is final, even of a debtor's costs against his proctor's lien. *Olive*. 423

JOINT CAPTURE.

The onus probandi is on the claimant. *Brazil*. 75

The prize must have been in sight from the claimant, and the claimant from the prize at the time of surrender. *Ibid*. 77

Proof of being in sight, at least in the case of the capture of a slaver, may, under certain circumstances, be established on the evidence of the claimants alone. *Ib*. 78
Surrender considered. Lowering sails constitutes surrender. *Ibid*. 79

JUDGMENT RECOVERED.

1. A Plaintiff having sued in a Court of law for a collision and obtained a verdict, is intitled, if the Defendant proves insolvent, to sue the ship in the Admiralty Court, notwithstanding the ship has changed hands. *John and Mary*. 471
2. So a master may sue in rem for his wages, after having obtained a judgment in personam against the owner, and proved the debt under his bankruptcy, even if the ship has changed hands. *Bengal*. 468

JURISDICTION.

See COLLISION, I.

SALVAGE, I.

NECESSARIES.

RESPONDENTIA.

LAUNCH.

See COLLISION, XI., 3.

LIEN.

See BOTTOMRY.

COLLISION.

MASTER'S WAGES.

NECESSARIES.

PROCTOR.

WAGES.

In an action for necessities the Court granted a sale and appraisement of the ship, without prejudice to the shipbuilder's lien upon the ship which was lying in his yard.
Nordstjernen. Page 260

LIGHTS.

See COLLISION, III., IV., V.

LIMITATION OF LIABILITY.

See COLLISION, XIII. .

LIS ALIBI PENDENS.

Semle:—A Plaintiff suing in a Court of Common Law, cannot sue in rem also, in respect of the same cause of action. *John and Mary.* 471

MARITIME RISK:

See BOTTOMRY, IV.

RESPONDENTIA.

MASTER.

See MASTER'S WAGES.

SALE OF SHIP.

MASTER'S WAGES.

(17 & 18 *Vict. c.* 104, s. 191.)

I. LIEN.

1. A master has, by the 191st section of the Merchant Shipping Act, 1854, a lien on the ship for his wages in a Vice-Admiralty Court

abroad, whatever may be the municipal law of the colony. The 209th section is an additional provision in favour of the seaman, and does not affect the right of the master. A master, being compelled by pressing necessity of ill health to leave his ship abroad, is intitled to sue immediately for wages. *Rajah of Cochin.* Page 473

2. The master of a foreign ship is intitled by s. 191 of the Merchant Shipping Act, 1854, to a lien on ship and freight for his wages.

Milford. 362*Jonathan Goodhue.* 524

3. The master's lien for wages continues notwithstanding the transfer of the ship. *Nymph.* 86

Bengal. 468

4. A master having sued for his wages at common law and recovered judgment, which judgment remains unsatisfied because of the Defendant's bankruptcy, and having further proved his debt under the Defendant's bankruptcy, is intitled to sue the ship in the Admiralty Court, notwithstanding the ship has changed hands. *Bengal.* 468

II. WAGES UNDER 50*l.*

A master like other seamen is restricted by s. 189 of the Merchant Shipping Act, 1844, from suing for wages under 50*l.* A place of occasional business is not a residence within the meaning of the section. *Blakeney.* 428

III. COUNTER-CLAIM.

1. A master is intitled to sue the ship for his wages, but not, unless a counter-claim is set up, for his disbursements; if a counter-claim is set up the whole general account between the master and the ship must be gone into. *Caledonia.* 17

In his claim for wages in the first instance, he may include commission upon profits due to him according to agreement. *Caledonia*. Page 17

2. A mortgagee who has taken possession of a ship at the termination of a voyage, defending an action brought by the master against the ship for his wages, and disclaiming a set-off, is intitled to deduct from the master's claim a payment made by him to the master on account of wages, but not payments made by the owner. *Ibid*.
3. In an action of master's wages, a mortgagee intervening and declaring to set up a set-off or counter-claim, but not filing any such counter-claim in the registry, but only a statement that he objected to all the claims in the master's account, except those relating to the payment of wages and the wages claimed, must submit to a settlement of all the accounts between the master and the ship. In this settlement the amount of a bill drawn by the master on the owners for the ship and dishonored by them, for which judgment has been recovered against the master, but execution not levied, is to be taken into account. *Glen-tanner*. 415

IV. FORFEITURE.

Error of seamanship in a master, or neglect to sign a bottomry bond, does not work a forfeiture of wages; the owner's remedy is by cross-action at common law. *Camilla*. 312

A master, engaged for a voyage out and home, if wrongfully discharged abroad, is intitled to wages until he can obtain other

employment; and, *semble*, until the termination of the entire voyage. *Camilla*. Page 312

V. AS AGAINST BOTTOMRY BOND-HOLDER.

1. A master being sole owner, having given a bottomry bond binding himself, ship and freight, cannot claim his wages to the prejudice of the bondholder. *William*. 346
2. Nor if master only. *Jonathan Goodhue*. 524

VI. MISCELLANEOUS.

1. In an action against ship and freight for master's wages, the mortgagee in possession is intitled to a release of the ship upon giving bail in the action, notwithstanding the master has become liable in respect of bills of exchange drawn upon the charterers for the ship's use. *Ringdove*. 310
2. A master suing for wages is a necessary witness in his own case, and, like a seaman, is intitled to compensation for loss of time during his detention to give evidence; the rate of wages is a fair measure of such compensation. *Olive*. 292

MEASURE OF DAMAGES.

See COLLISION, XIV.

SLAVE-TRADE.

MORTGAGEE.

See BOTTOMRY, VIII., 2, 4, 5.

FREIGHT.

MASTER'S WAGES, III.

NECESSARIES (3 & 4 Vict. c. 65, s. 6.)

1. Butcher's meat is a necessary. *N. R. Gosfabrick*. 344
2. So copper sheathing. *Perla*. 353

3. So coals shipped at intervals for several voyages. *West Friesland*.
Page 454
4. The agent for a ship, being also part owner, may sue in rem for necessaries. *Ibid*.
5. A suit will lie in rem for necessaries supplied to a foreign ship in a colonial port. *Wataga*. 165
6. In an action in pœnam, where necessary monies were advanced by merchants in this country to a foreign ship, partly when the ship was lying in a port of refit out of the jurisdiction of the Court, and partly upon her arrival in England, the Court will upon motion (unopposed) order payment out of the proceeds of the ship in the registry. *Afua van Linge*. 514
7. A ship cannot be sued for money advanced to the master to procure his liberation from gaol, where he was imprisoned for a debt incurred for necessaries. *N. R. Gosfabrick*.
344
8. Where necessaries are supplied for the use and benefit of a ship, the presumption is that the ship is liable. *Perla*. 353
9. *Semble*, a party supplying necessaries and taking a bill in payment is intitled, if the bill is dishonored, to sue in rem. *N. R. Gosfabrick*.
344
10. The lien for necessaries continues notwithstanding the sale of the ship, if there has been no laches in enforcing it. *West Friesland*. 454
11. Where there are several actions for necessaries, and the proceeds are insufficient, the proceeds will be pro ratâ divided, if application is made to the Court before decree pronounced. *Desdemona*. 158

ORDER OF PRECEDENCE OF CLAIMS.

1. Two actions in respect of one collision by different parties, bail given in both actions; agreement between second Plaintiff and Defendant that the decree in the second action shall follow the decree in the first action; damage pronounced for; value of the ship paid into Court. The first Plaintiff is intitled, if no application has been made by the second Plaintiff before the hearing for an equitable decree, to priority of payment in full. *Clara*. Page 6
But if before the hearing such an application has been made by the second Plaintiff, the Court will pronounce an equitable decree,—if in favour of the damage, for an apportionment of the money under the hand of the Court between the Plaintiffs; if against the damage, for an equitable payment of the costs between the plaintiffs. *Ibid*.
2. The claim of a party having obtained a decree in a cause of damage preferred to wages. *Linda Flor*. 309
3. *Semble*. Bond preferred to wages earned before the execution of the bond. *Janet Wilson*. 261
Jonathan Goodhue. 524
4. Bond preferred to wages of master executing the bond. *Jonathan Goodhue*. 524
5. Bond preferred to claim of owner for wages paid by him after the execution of the bond. *Janet Wilson*. 261
6. Where there are several actions for necessaries, and the proceeds are insufficient, the proceeds will be pro ratâ divided, upon application to the Court before decree pronounced. *Desdemona*. 158

PILOT.

See COLLISION, IX.

PLEADING AND PRACTICE.

See COLLISION, XV.

MASTER'S WAGES, III.

ORDER OF PRECEDENCE
OF CLAIMS.

POSSESSION, 1.

REGISTRAR.

RELEASE.

POSSESSION.

See SALE OF SHIP.

1. A party claiming title to a ship will not be allowed to rely on two conflicting titles. *Margaret Mitchell*. Page 382
2. The Merchant Shipping Act, 1854, admits equitable interests in ships. The Court will not dispossess the equitable owner of the moiety of a ship at the instance of the legal owner of more than a moiety. *Semble*. The Court having no original jurisdiction over equitable title will not dispossess the legal owner of a moiety at the instance of the equitable owner of more than a moiety. *Victoria*. 408
3. The Admiralty Courts abroad have no jurisdiction over causes of title. *Australia*. (P. C.) 480

POWER OF ATTORNEY.

See SALE OF SHIP, 10, 11, 12.

PRELIMINARY ACT.

See COLLISION.

PROCTOR.

1. A proctor has a lien for costs upon all sums of money decreed by the Court to be paid to his party; payment of wages before shipping-master held to be no satisfaction of a decree for wages. *Araminta*. 81
2. But payment to a third party under a Judge's garnishee order of costs pronounced due to a party

by decree of the Court of Admiralty, is satisfaction of the decree, even as against that party's proctor claiming a lien. *Olive*. Page 423

QUEEN'S SHIP.

1. Officers and crew awarded salvage. *Earl of Eglinton*. 7
2. Costs given against a Queen's ship pronounced against in a cause of collision. *H.M.S. Swallow*. 32

REGISTRAR.

1. A report of the Registrar will not be altered by the Court, if the Court is in any doubt. *Clyde*. 23
2. On an appeal from a report of the Registrar fresh evidence is admissible. *Ironmaster*. 441
3. Where a ship is arrested for a specific demand, the amount cannot be referred to the Registrar, unless it appears that something in any event is due. *West Friesland*. (P. C.) 456
4. Where the amount of damage is referred to the Registrar and merchants, and a tender is made by the Defendant but not accepted by the Plaintiff, if the amount pronounced to be due is less than two-thirds of the Plaintiff's claim, but exceeds the tender of the Defendant, the Plaintiff is liable for the general costs of the reference, but the Defendant for the costs occasioned by his making an insufficient tender. *Seine*. 513

RELEASE.

If a ship is arrested for ship and freight, a party showing a *prima facie* title to freight (as a mortgagee in possession), is intitled to a release of the ship upon giving bail in the action. *Ringdove*. 310

RESIDE.

Using another man's premises as an occasional place of business is not a residing within the meaning of sect. 189 of the Merchant Shipping Act, 1854. *Blakeney*. Page 428

RESPONDENTIA.

The Court of Admiralty has jurisdiction over bonds of respondentia as over bottomry bonds. *Cargo ex Sultan*. 504

Where a vessel carrying cargo is stranded on a foreign coast and unable to proceed, and communication with the owners of the cargo would be attended with great delay and difficulty, the master of the ship, to tranship and send on, may, on his own authority, give a respondentia bond to release the cargo lying under arrest for salvage. *Ibid*.

A bond covering in part property not exposed to maritime risk is bad as to that part, but may be valid as to the residue. *Ibid*.

Where a part only of goods hypothecated by a respondentia bond reaches its destination, such part is only liable to pay a proportional part of the money secured by the bond; namely, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given. *Ibid*.

SALE OF SHIP BY MASTER ABROAD.

1. The sale by the master of his owner's ship abroad, without the owner's authority, is legal in the

case of necessity only:—conditions of such necessity examined.

Glasgow. Page 145

Margaret Mitchell. 382

Australia. (P. C.) 480

2. The purchaser from the master is bound to show the necessity of the sale. *Glasgow*. 145

Australia. (P. C.) 480

3. But whether such onus probandi attaches to a second purchaser depends on all the circumstances of the case. *Australia*. (P. C.) 480

4. The sale being legal, ship restored to the purchaser with demurrage and costs. *Glasgow*. 152

5. Sale of the ship by the master abroad by fraud, the purchaser being innocent, pronounced void, but costs not given. *Empress*. 160

6. *Semble*. The owner receiving the proceeds of a sale of his ship by the master abroad, is estopped from disputing such sale, and so are parties deriving title under him with knowledge of the facts. *Margaret Mitchell*. 382

7. An omission by the first purchaser from the master to comply with the Ship Registry Act (8 & 9 Vict. c. 89, ss. 37, 38), does not affect the title of a subsequent purchaser. *Australia*. (P. C.) 480

8. A shipwright, surveying the ship with a view to the sale thereof by the master, may be justified in becoming the purchaser. *Ibid*.

9. The owner of a ship, dissatisfied with the sale of his ship by the master abroad, must seek recovery with the utmost possible promptitude, or he may be held to ratify the sale by acquiescence. *Ibid*.

10. *Semble*. A power of attorney to sell a ship, given to a master (among other reasons) by way of security to cover his advances, does not

justify him in selling against his owner's consent, except in cases of necessity. *Margaret Mitchell*.

Page 382

11. A power of attorney to sell a ship may be substantially revoked by parol; and the attorney selling thereafter is guilty of a breach of trust.

If the grantee of a power of attorney to sell a ship sells fraudulently, or so as to commit a breach of trust, the fraud of the attorney vitiates the title of the purchaser, if the fraud was known to him, or could have been known by reasonable inquiry. *Ibid*.

12. A power of attorney to sell a ship is not revoked by a decree of the grantor's insolvency in a colonial possession, so as to invalidate a bonâ fide exercise of the power before notice of insolvency. *Ibid*.

SALVAGE (17 & 18 Vict. c. 104, s. 460.

I.

1. Salvage services performed beyond three miles of the coast of the United Kingdom do not come within section 460 of the Merchant Shipping Act, 1854, and in such cases the costs are entirely in the discretion of the Court. *Leda*. 40
Argo. 112
Actif. 237
2. Certificate for costs will be granted to salvors under section 460 of the Merchant Shipping Act, 1854, if the case contains a charge of misconduct against them. *Fenix*.

16

Or a question of agreement or other question of difficulty. *Ibid*.

3. The burden of proof lies upon the owners of the ship, to show that the Court has no jurisdiction. *Argo*.

112

4. *Semble*. If the ship is otherwise in custody of the Court, salvors claiming less than 200*l*. for services performed within three miles of the coast may sue in the Admiralty Court. *Argo*. Page 112
5. The concurrent jurisdiction of the High Court of Admiralty over all salvage services rendered within the jurisdiction of the Court of Admiralty at the Cinque Ports is not taken away by section 460 of the Merchant Shipping Act, 1854. *Maria Luisa*. 67

II. SALVAGE SERVICE.

1. A contract to tow embraces the risk of ordinary bad weather, but is put an end to by weather rendering the performance of the undertaking impossible; and in that case subsequent services may be in the nature of salvage. *Galateu*. 349
2. A salvage suit grafted on a cause of collision by the successful party viewed unfavourably by the Court; but where real salvage services are performed, salvage reward will be given. *Sappho*. 242
3. A claim of salvage for services originally in the nature of pilotage discouraged by the Court. *Jonge Andries*. 229, 304
4. Where the crew of a vessel is much reduced by deaths or sickness, another vessel supplying the deficiency on the high seas from her own crew is intitled to salvage. *Roe*. 84
Janet Mitchell. 111
Apportionment of salvage in such case. *Roe*. 84
5. Salvage reward given, and in priority, for the salvation of human life. *Bartley*. 198
Coromandel. 205

6. Where a master and crew leave their ship for the safety of their lives, the ship is derelict, though there may be an intention of sending a steamer to look for her. *Coromandel.* Page 205
7. Where a vessel was abandoned in mid-day in the Gull-stream, in consequence of and during a sudden collision, and a steamer at hand towed the vessel into Ramsgate:—*Held to be a salvage service, not a derelict. Fenix.* 14

III. AGREEMENT.

1. An agreement dishonestly made by the master of a ship, to secure so-called salvors an excessive reward, is not valid against the owner of the ship. *Theodore.* 351
2. A salvage agreement will not be set aside unless proved to be exorbitant or to have been obtained by compulsion or fraud. *Helen and George.* 368
3. Upheld, even if *vivâ voce* only. *Firefly.* 240
4. A salvage agreement is not lightly to be set aside on the ground of the true condition of the ship not having been fully disclosed to the salvors, or upon the ground of the services becoming more onerous by the tempestuousness of the weather. *Jonge Andries.* 227

IV. MISCELLANEOUS.

1. Salvage awarded to officers and crew of her Majesty's ships of war. *Earl of Eglinton.* 7
2. The charterer of a vessel not intitled to salvage earned by the vessel. *Alfen.* 189
3. *Quære:*—Whether the master of a ship is the agent of the owner to compromise a salvage claim, s.

- the owner being at hand and giving no authority. *Elise.* Page 436
4. Negotiation by the owner to refer a claim of salvage to arbitration is no conclusive admission of salvage services rendered, or negation of a defence on the ground of the salvors' misconduct. *Martha.* 489
5. Salvors first in possession, even if adequate to save the property, if prevented from continuous possession, cannot exclude subsequent actual co-salvors from salvage reward. *Clarisse.* 132
6. Salvors may, by misconduct, forfeit all or part of their reward, but the misconduct must be distinctly proved. *Charles Adolphe.* 153
Martha. 489
7. Salvors, causing damage to the ship salvaged by improperly taking her into an unfit harbour, mulcted in a proportion of the damage. *Perla.* 231
8. Salvage suit brought in bad faith after an award by consent before justices; salvors condemned in costs and damages. *Nautilus.* 105
9. So where the award was by the Commissioners of the Cinque Ports. *Gloria de Maria.* 106
10. Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the Commissioners of salvage for the Cinque Ports to adjudicate the matter. No notice of the intended meeting was given to any of the salvors, and it was proved that it was not usual to give any such notice. At the meeting of the Commissioners one set of salvors was unrepresented, but it was proved that they were aware of the meeting, and were at hand. The Commissioners made an award

- upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, and brought their action in the Admiralty Court:—*Held*, that the award was no bar to the action, the Plaintiffs not having been parties to the first decision. *Elise*. Page 436
11. The Court will increase the salvage awarded by local justices, if clearly inadequate. *Messenger*. 191
Harriett. 218
12. The Court of Appeal will not, except in extreme cases, disturb the judgment in a cause of salvage upon a mere question of amount. *Clarisse*. (P. C.) 134
13. Where the ship is the chief salvor, the owners are intitled to a large proportion of the salvage. Apportionment in such case between owners, master and crew. *Perla*. 232
Himalaya. 515
14. The owners of a steam-vessel rendering a salvage service to be well rewarded; but after deducting for repairs and detention, they are not intitled to more than a moiety of the residue of the sum awarded. *Spirit of the Age*. 286
15. A moiety of the property saved, with costs, is the maximum of remuneration that can be allowed to salvors; and this rule obtains in Vice-Admiralty Courts abroad. *Inca* (P. C.) 370
The same rule does not apply to derelict. *Ibid*.
16. Action against ship, cargo and freight for salvage; ship arrested and bailed; cargo not arrested, having been discharged; owners of ship compelled to bring in an account of freight on oath, and to set forth when and by whom such freight has been paid. *Peace*. Page 115
The owners of the cargo in such case ordered to pay in proportion of the net value of the cargo to the total value of the property saved, and a proportionate share of the costs. *Ibid*.
17. The salvors of cargo are only intitled to salvage on the value at the port where their services concluded. *George Dean*. 290
18. In estimating the net value of the cargo, customary charges, including discount, to be allowed. *Peace*. 115
19. Salvage actions should be brought without delay. *Rajahstan*. 171
20. Where two sets of salvors sue separately unnecessarily, one set of salvors denying the services of the other, the Court will protect the owner by costs. *Bartley*. 198
21. Costs of affidavits brought in by salvors not allowed for, the owners having in substance admitted the services. *Spirit of the Age*. 209

SEAMAN'S WAGES.

See WAGES.

SEQUESTRATION.

Sequestration for costs of appeal to the Judicial Committee of the Privy Council granted under 7 & 8 Vict. c. 69, s. 12. *Australia*. (P. C.) 480

SHORT ALLOWANCE.

See WAGES, 1.

SLAVE-TRADE.

1. In a cause of appeal from the sentence of a Vice-Admiralty Court, decreeing forfeiture of a ship and penalties on the shippers under 5 Geo. 4, c. 113, the captors, to sup-

port the condemnation of the ship, must prove that the owners of the ship knowingly and wilfully employed the ship in contravention of the Act; and, to support the decree for penalties against the shippers, must prove that they knowingly and wilfully shipped the goods on board the ship to be so employed.

In the Vice-Admiralty Court the parties implicated, if known, must be cited by name in the monition of the Court, to show cause against the forfeiture and penalties, as required by the Order in Council, issued under 2 & 3 Will. 4, c. 51; and if the monition be general only, no penalties against individuals can be pronounced for.

If the Judge believes the parties implicated are *bonâ fide* ignorant of the proceedings, he should suspend his judgment for the penalties.

Shippers not cited by name in the monition of the Vice-Admiralty Court, and condemned in penalties, allowed to intervene in the appeal promoted by the owners of the vessel.

A special libel of appeal, with allegation and responsive allegation, pleading new matter, admitted by the Court of Appeal, and evidence taken thereon.

Under the circumstances of the case, the Court of Appeal, reversing the sentence of the Court below, restored the ship, with costs and damages, and remitted the penalties of the shippers, with costs, but without damages, and refused costs to the owner of the cargo, who had not cleared himself by making an affidavit. *Newport*. Page 317

2. The measure of damages in a case of wrongful capture is the loss ac-

tually sustained and interest thereon from the date of capture: no allowance can be made for the loss of contingent profits. *Levin Lank*. Page 45

3. The capture of a chartered ship, and condemnation and sale by decree of a Vice-Admiralty Court, do not, if the decree is reversed by the Court of Appeal (although more than three years afterwards), with costs and damages, amount to a prevention by the perils enumerated in the charter; but the shipowner is bound to perform his contract or to pay damages.

A shipowner has no claim to freight *pro ratâ itineris peracti*, except there be an acceptance of the goods by the shipper at the shorter destination such that the law will imply a new agreement for freight *pro ratâ*.

Under a decree of restitution with costs and damages, a shipowner is intitled to recover damages:—1, for loss of chartered freight; 2, for liabilities incurred for non-performance of his charter (or costs incurred by final performance thereof); 3, for interest upon the amount recovered from the probable date of the termination of the chartered voyage (supposing there had been no capture), up to the date of payment. But he is not intitled to recover for estimated profits from the employment of the ship subsequently to the chartered voyage. *Newport*.

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STATUTES.

A statute general in terms, and intended for the protection of navigation, applies to foreign vessels within British waters. *Milford*.

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5 Geo. IV. c. 113. See SLAVE-TRADE.

3 & 4 *Vict. c. 65, s. 6.* See NECESSARIES.

7 & 8 *Vict. c. 69, s. 12.* See SEQUESTRATION.

13 & 14 *Vict. c. 93, ss. 96, 97, 98.*
See WAGES, 2.

17 & 18 *Vict. c. 104, s. 189.* See MASTER'S WAGES, II.

17 & 18 *Vict. c. 104, s. 191.* See MASTER'S WAGES.

17 & 18 *Vict. c. 104, s. 209.* See MASTER'S WAGES, I., 1.

17 & 18 *Vict. c. 104, s. 223.* See WAGES, I.

17 & 18 *Vict. c. 104, s. 291.* See COLLISION, VII., 5.

17 & 18 *Vict. c. 104, s. 295.* See COLLISION, III., IV.

17 & 18 *Vict. c. 104, s. 296.* See COLLISION, VI.

17 & 18 *Vict. c. 104, s. 297.* See COLLISION, VII.

17 & 18 *Vict. c. 104, s. 298.* See COLLISION, VIII.

17 & 18 *Vict. c. 104, s. 299.* See COLLISION, IX., 7.

17 & 18 *Vict. c. 104, s. 388.* See COLLISION, IX.

17 & 18 *Vict. c. 104, s. 458.* See SALVAGE, II., 5.

17 & 18 *Vict. c. 104, s. 460.* See SALVAGE, I.

17 & 18 *Vict. c. 104, s. 514.* See COLLISION, XIII., XV., 4.

17 & 18 *Vict. c. 120, s. 4.* See COLLISION, III., 4.

TENDER.

See REGISTRAR, 4.

WAGES, 2.

TOWING.

See COLLISION, II., 1; III., 2;
VII., 4; IX., 6; XI., 1;
XIV., 13.

SALVAGE, II., 1.

TRIM.

See COLLISION, XI., 2.

TYNE.

The river Tyne is a narrow channel within the meaning of 17 & 18 *Vict. c. 104, s. 297.*

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VICE-ADMIRALTY COURTS.

1. Rules as to salvage prevailing in the High Court of Admiralty, to obtain in Vice-Admiralty Courts. *Inca (P. C.).* 370
2. The Merchant Shipping Act, 1854, applies to the colonies, and by section 191, the master of a British ship has a lien upon the ship in a Vice-Admiralty Court for his wages. *Rajah of Cochin.* 473
3. Vice-Admiralty Courts have not the jurisdiction conferred on the High Court of Admiralty by 3 & 4 *Vict. c. 65*; they therefore cannot try causes of title to ships. *Australia. (P. C.)* 480
See SLAVE TRADE.

WAGES.

1. A master and crew, suing in *pœnam* against the ship for wages, are allowed to recover under 17 & 18 *Vict. c. 104, s. 223*, compensation for short allowance of provisions. *Josephine.* 152
2. An offer to pay seamen's wages before a shipping-master, according to 13 & 14 *Vict. c. 93, s. 98*:—*Held*, under the circumstances, no tender so as to bar the costs of the seamen's action for wages in the Admiralty Court. *Mobile.* 256

3. The claim of a party having obtained a decree in a cause of damage is preferred to that of the seamen for wages. *Linda Flor.* Page 309
4. *Semble.* Wages earned before the execution of a bond will be postponed to the bond.
Jonathan Goodhue. 524
Janet Wilson. 261

WITNESS.

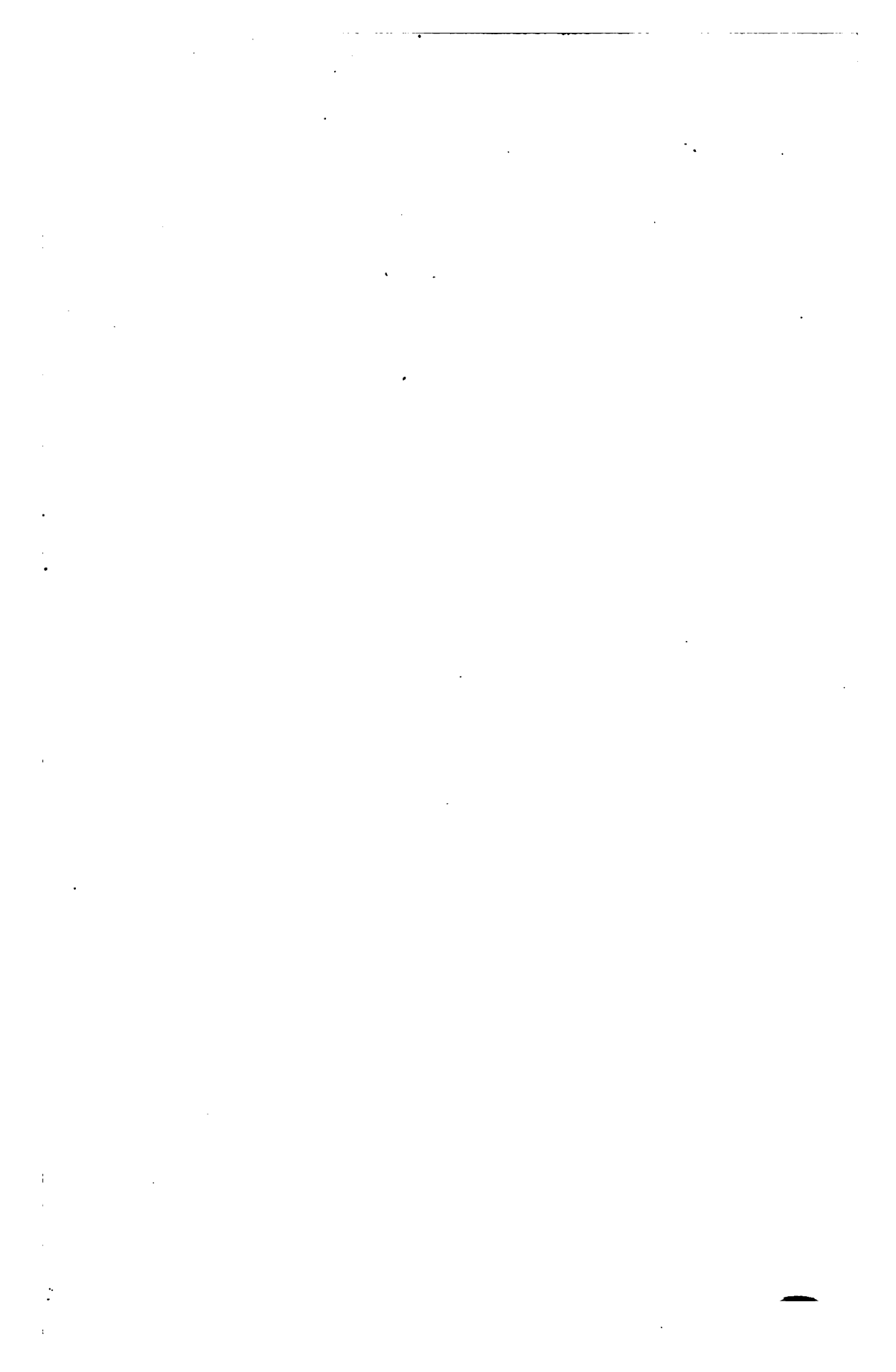
1. A master suing for wages is a necessary witness in his own cause, and like a seaman is intitled to compensation during his detention

- to give evidence; the rate of wages is a fair measure of such compensation. *Olive.* Page 292
2. Practice as to right of cross-examining witnesses. *Chance.* 294

WRONGFUL ARREST.

Plaintiff in a cause of collision failing to prove the identity of the ship proceeded against, is not liable for damages occasioned by the arrest of the defendant's ship, unless the arrest was made *malâ fide*, or with *crassâ negligentia*.
Evangelismos. (P. C.) 378

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